Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985-2001

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"Punitive damages have replaced baseball as our national sport."[1]
— Theodore B. Olson

"The public gets anecdotal glimpses of atypical cases without a sense of their overall significance. . . . Simplistic sound bites have displaced systematic analysis."[2]
— Deborah L. Rhode

"[Civil jury trial] data suppl[y] a crucial empirical dimension to an array of key research questions that remain the subject of intense, on-going theoretical and public debates."[3]
— Michael Heise

Defendant Navarette, a professional boxer, abducted, brutally beat, assaulted, raped, and sodomized plaintiff Ofisa, a waitress. The state court jury awarded $40,000 in general damages and $20,000 in punitive damages.
— *Ofisa v. Navarette*,
Case S3 (*see* Appendix B, *infra*)

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[1] Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17.

[2] Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 993-94, 1018 (1998).

[3] Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 823 (1999).

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Whether extreme sport or war, the national polemic[4] over punitive damages continues to rage, with no obvious winner or resolution in sight.[5] Splashy media coverage of large punitive damages awards has captured popular attention[6] and fueled public outrage over cases that have become the

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[4] Marc Galanter used the term "polemical" to describe the "power" of the "war stories" of the tort reform movement in 1983. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 11 (1983) [hereinafter Galanter, *Landscape of Disputes*].

[5] The public debate about punitive damages is only one part of the larger national controversy about the tort law system that began in the 1970s, *see* Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 11 [hereinafter Galanter, *Shadow Play*]; *see also* Galanter, *Landscape of Disputes, supra* note 4, at 6-11 (describing the "'hyperlexis' explosion"), although it has become a predominant theme. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1409 (1993)(quoting the *Wall Street Journal* as observing that punitive damages are "the major fuel of the litigation explosion"); Jerry J. Phillips, *To Be Or Not To Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55, 56 (1986) (naming punitive damages as first among the "common current litany of complaints against the tort system").

[6] William Glaberson, *When the Verdict is Just Fantasy*, N.Y. TIMES, June 6, 1999, at 4 ("For years, across the country, accounts of bizarre jury verdicts and huge damage awards (like the $2.9 million

notorious poster children of the nationwide tort reform movement.[7] Tort reform proponents have lobbied vigorously for controls on punitive damages at the national level[8] and exerted unrelenting pressure on state legislatures to pass new laws to control "runaway" awards.[9]

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collected by the McDonald's customer who spilled coffee on herself) have been used to prove that the courts are wacky or worse."). Recently, large punitive damages awards in precedent-setting tobacco smoker cases have grabbed the headlines, *e.g.*, (1) the August 2001 Los Angeles Boeken verdict, "the largest award in an individual lawsuit against a tobacco company," a jury verdict of $3 billion in punitive damages reduced to $100 million by the state court judge (*see* Associated Press, *Smoker Accepts $100 Million Award in Los Angeles Tobacco Case*, THE SAN DIEGO UNION-TRIBUNE (Aug. 21, 2001), *available at* http://www.signonsandiego.com/news/state/20010821-2058-tobaccotrial.html) (last accessed June 20, 2004); (2) the Oregon Schwarz case in March 2002, a $150 million punitive damages award by a jury reduced by the state court judge to $100 million (*see, e.g.*, Henry Weinstein (LA Times), *Philip Morris must pay $150M*, HONOLULU ADVERTISER, Mar. 23, 2002, at A3 (reporting on the "second-largest verdict ever awarded in an individual smoker case"); and (3) the 1999 award in the Florida smoker class action case, *Engle*, where the jury issued a "record-shattering verdict" of $145 billion in punitive damages against the nation's five largest cigarette makers, overturned on appeal in 2003 (*see Florida Appeals Court Throws Out $145 Billion Tobacco Verdict*, CNN.COM, May 27, 2003, *available at* http://edition.cnn.com/2003/LAW/05/21/tobacco.ruling.overturned).

[7] *See, e.g.*, Associated Press, *Judge cuts GM Liability by $3.7 billion: Punitive Damages called 'excessive,'* HONOLULU ADVERTISER, Aug. 27, 1999, at A3 (reporting that a Los Angeles trial judge "slashed $3.7 billion yesterday from a $4.9 billion judgment against General Motors in a lawsuit over the explosion of a Chevrolet Malibu gas tank, saying the punitive damages were 'excessive.'"); *see also* American Tort Reform Association, *Looney Lawsuits*, *available at* http://www.atra.org/display/13 (last accessed June 20, 2004); STEPHEN DANIELS & JOAN MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 5 (1995) (discussing "horror stories"); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996) [hereinafter Galanter, *Antidote*]; Michael J. Saks, *Malpractice Misconceptions and Other Lessons About the Tort Litigation System*, 16 JUST. SYS. J. 7 (1993).

[8] Congressional interest in tort reform arose in the mid-1980s. In 1986, Senator Mitch McConnell introduced the Litigation Abuse Reform Act of 1986, asserting that America suffered from "too much litigation." Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3 (1986) [hereinafter Galanter, *The Day After*]. For the past decade, Congress has repeatedly considered a host of limitations on punitive damages proposed by advocates of tort reform. On July 30, 2002, the Senate considered but then tabled 57 to 42 the "McConnell amendment" to S. 812 (a prescription drug bill, which would have enacted limitations on medical malpractice suits, products liability, and nursing home claims). S.A. 4326, proposed to amend S.A. 4299, proposed to amend S. 812, 107th Cong. (2002). CONG. REC. § 7435 (daily ed. July 26, 2002) (amendment submitted and proposed by Senator McConnell, R-Kentucky). The amendment would have adopted new restrictions on punitive damages such as: a clear and convincing standard of proof, § 15(a); a substantive standard of intent to injure or substantial certainty of unnecessary injury and failure to avoid injury, or conscious flagrant disregard of a substantial and unjustifiable risk of unnecessary injury, § 15(a); a bar on punitive damages in cases where there was no compensatory award (including nominal damages under $500), § 15(b); at defendant's request, a bifurcated proceeding on punitive damages liability and the amount of the award, § 15(c); a limited set of eight factors that a trier of fact could consider in setting the award amount, § 15(d); a cap of two times the compensatory award, § 15(e); and the elimination of any joint and several liability for punitive damages, § 17. Similarly restrictive provisions on punitive damages resurfaced with recent success in the House, H.R. 5,108th Cong., § 7 (Feb. 5, 2003), the "Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH)" Act of 2003 (passed on March 13, 2003), but then were once again stalled in the Senate. S. 607, 108th Cong., § 8 (Mar. 12, 2003). *See* Kevin O'Reilly, *Tort Reform Advocates Strike While Iron is Hot*, INSURANCE JOURNAL.COM, May 5, 2003, *available at* http://www.insurancejournal.com/magazines/west/2003/05/05/features/28729.htm (last accessed June 20, 2004) (noting Senate bill "still awaiting action").

[9] *See* Tanya Albert, *Tort Reform Clears House, Moves Forward in States*, AMEDNEWS.COM, Apr. 7,

Views among the public, bench, bar, and legislators about the wisdom of punitive damages in American tort law as a remedy for injured individuals have long been polarized.[10] In 1872, Judge Foster criticized punitive damages as a "monstrous heresy . . . an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."[11] Modern critics focus less on the jurisprudential oddity of punitive damages—which are uniquely designed to punish and deter defendants, rather than compensate victims,[12] and are therefore decried as an anomaly among traditional tort remedies[13]—and more on what they perceive to be the unfair results of jury application of the doctrine: excessive awards, runaway verdicts, and a chilling effect on businesses, product innovation, and the medical profession. On the other hand, plaintiffs' advocates contend that punitive awards are a well-established historical remedy for that small category of outrageous torts that cross the line from private to public wrongs. On the practical level, they see punitive damages as integral and "paramount" to individual victims' rights,[14] effective

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2003, *available at* http://www.ama-assn.org/amednews/2003/04/07/gvl10407.htm (last accessed June 20, 2004) ("rallies, protests and old-fashioned lobbying seem to be paying off as tort reform action at the federal and state level takes full bloom this spring"). Reformers now have a powerful ally in President George W. Bush, who championed limiting tort lawsuits when he was Governor of Texas. George Lardner, Jr., *Tort Reform: Mixed Verdict: Bush's First Priority in Office Pleased Business, Spurred Donations, and Cut Public's Remedies*, WASHINGTON POST, Feb. 10, 2000, at A06 (noting that Bush signed seven major tort reform bills, including a cap on punitive damages). Once in office, President Bush personally rallied tort reform proponents like the American Medical Association, Joel B. Finkelstein, *Bush to AMA: Tort Reform a must*, AMEDNEWS.COM, Mar. 17, 2003, *available at* http://www.ama-assn.org/amednews/2003/03/17/gvl10317.htm (last accessed June 20, 2004). Bush furthermore appealed for tort reform in his 2003 State of the Union address, Associated Press, *House Passes Medical Malpractice Bill*, Mar. 13, 2003, *available at* http://www. edition.cnn.com/2003/ALLPOLITICS/03/13/medical.malpractice (last accessed June 20, 2004) and publicly celebrated the passage of the HEALTH Act by the House in March 2003 (*see supra* note 8).

[10] *See* Galanter, *Antidote*, *supra* note 7, *passim* (discussing the origins, breadth, and depth of the tort reform debate).

[11] Fay v. Parker, 53 N.H. 342, 382 (1872) (Foster, J.) ("Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies?" *Id.* at 382).

[12] *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 9 (5th ed. 1984) ("Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, or teaching the defendant not to do it again, and of deterring others from following the defendant's example.").

[13] *But see* Galanter & Luban, *Poetic Justice*, *supra* note 5, at 1394 (suggesting that punitive damages might be an anomaly when "viewed against the background of . . . conventional taxonomy," but "are no anomaly" when viewed in the pluralistic context of various forms of social punishment).

[14] Mothers Against Drunk Driving, *MADD's Victim-Related Position Statements*, *available at* http://www.madd.org/victims/0,1056,2491,00.html#tort (last accessed June 20, 2004) ("MADD opposes any measures which will restrict or in any way limit the rights of victims of impaired driving crashes to seek and recover punitive damages in any cause of action arising out of impaired driving crashes."); Center for Justice and Democracy, *Glossary of "Tort Reforms,"* *available at* http://www.centerjd.org/free/mythbusters-free/MB_glossary.htm (praising the value of punitive damages and calling tort reform proposals "cruel laws that reduce the protections and rights our country provides to

at protecting the public from defective products and unsafe services, and "the only way that large corporations can be punished and deterred from future egregious misconduct."[15]

The national punitive damages polemic reached a crescendo in 1994, after the record-breaking $5 billion punitive damages award in the *Exxon Valdez* case.[16] Responding to the news of the award, now-U.S. Solicitor General Ted Olson proclaimed punitive damages as "our national sport," calling the award a "pure windfall" resulting from "America's capricious and whimsical punitive damages system . . . running amok."[17] He expressed outrage that half-million dollar punitive damages verdicts "used to be a rarity" but were now "commonplace."[18] The new national sport of punitive damages awards was, he said, "a perverse combination of lottery and bullfighting, selecting beneficiaries and targets almost at random and inflicting brutal punishment."[19] The "game" could be won by those claiming even "remote or speculative injury" allegedly caused by "wealthy and distant corporation[s]."[20]

Defenders of the *Exxon Valdez* punitive damages verdict included the venerable *New York Times,* which editorialized that the verdict was the product of a "keenly attentive" and not "runaway" jury, and solemnly concluded that the verdict "deserve[d] to stand."[21] Emphasizing that the *Exxon Valdez* spill was the largest oil spill in U.S. history,[22] the plaintiffs

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those who are injured") (last accessed June 20, 2004).

[15] Leo V. Boyle, President, Association of Trial Lawyers of America, *Punitive Damage Award in Exxon Valdez Case Should Be Measured by Exxon's Behavior, Not Ratio* (Nov. 8, 2001), *available at* http://www.atla.org/consumermediaresources/tier3/press_room/president/boyle-exxon.aspx (last accessed June 20, 2004).

[16] *See In re* Exxon Valdez, 270 F.3d 1215, 1241 (9th Cir. 2001)(remanding the question of punitive damages for consideration under the due process clause). *See also* Caleb Solomon *Exxon Is Told To Pay $5 Billion for Valdez Spill*, WALL ST. J., Sept. 19, 1994, at A3. The punitive damages award was to be paid to the class of 10,000 fishers, a class of Alaska Native fishers, and others, totaling 34,000, averaging about $150,000 per plaintiff before deductions for attorneys' fees. Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17. During trial, plaintiffs' counsel sought a total of $15 billion in punitive damages, Caleb Solomon, *Jury Finds Exxon Reckless in Oil Spill; Damages of $16.5 Billion May Be Sought*, WALL ST. J., June 14, 1994, at A3, stating, "We want to take a big enough bite out of their butt to change their behavior." Allanna Sullivan, *Exxon Begins Final Defense in Valdez Spill*, WALL ST. J., May 2, 1994, at B1 (quoting Brian O'Neill, lead attorney for plaintiffs).

[17] Olson, *Rule of Law*, *supra* note 16, at A17 (stating also that the award served "no constructive societal function and is actually quite harmful and counterproductive" given that Exxon had already spent $3.5 billion in fines, damages, and cleanup costs).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Editorial Desk, *Long Shadow of the Exxon Valdez*, N.Y. TIMES, Sept. 21, 1994, at A22 ("Despite its size, the penalty is appropriate to the scale of the ecological havoc wrought by the spill and the reckless behavior that caused it.").

[22] Ken Wells, *Hazelwood Is Acquitted of Most Charges*, WALL ST. J., Mar. 23, 1990, at A3 (plaintiffs

argued that "misdeed[s] of historic proportions deserve[d] a penalty of historic proportions."[23] The Sierra Club called the award "necessary . . . to set an example that not even Exxon can run amok and get away with it."[24] According to Riki Ott, an Alaskan fisher and scientist, "Even $5 billion won't bring justice, but it will go a long way toward bringing closure to this sorry event."[25] After the United States Supreme Court in October 2000 denied Exxon's attempt to overturn the award for jury misconduct,[26] consumer advocate Ralph Nader decried Exxon's failure to pay the award more than a decade after the verdict, calling the company's response to the award "a legal war of attrition, while thousands of Alaskans and others suffered."[27] The reversal of the *Exxon Valdez* punitive damages verdict by the Ninth Circuit Court of Appeals in November 2001, based on constitutionality concerns of excessiveness,[28] did not quiet the long-running controversy.

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called the spill the "biggest environmental disaster in the U.S. this century"). *See also* Ron Engstrom, *Court: Exxon bill too high*, ANCHORAGE DAILY NEWS, Nov. 8, 2001, at A1 ("When an Anchorage jury handed down the award in 1994, it was the biggest punitive damages award in U.S. history . . . .").

[23] *Opinion*, ANCHORAGE DAILY NEWS, Nov. 10, 2001, at B6.

[24] Carl Pope (Executive Director, Sierra Club), *Statement of Sierra Club Executive Director Carl Pope Regarding Court Ruling $5 Billion Exxon Valdez Award Excessive*, TRUTHOUT (Nov. 7, 2001) *available at* http://www.truthout.org/docs_01/11.08D.Valdez.htm (last accessed June 20, 2004) ("This disaster became an icon for corporate irresponsibility. It won't send a strong message for our future if they are only given a slap on the wrist.").

[25] Riki Ott, *Why Exxon Owes Alaska $5 Billion*, ANCHORAGE DAILY NEWS, June 25, 2002, at B6:

> "Exxon's spill harmed thousands of people and dozens of communities. This spill continues to haunt our lives to this day in the form of socioeconomic trauma from lingering damages to our environment and fisheries; physical trauma from injured health; and emotional trauma from Exxon's ridiculous court delays and misleading public statements."

[26] Exxon Mobil Corp. v. Baker, 531 U.S. 919 (2000).

[27] Ralph Nader, *Justice Delayed Is Justice Denied*, Common Dreams.org, *available at* http://www.commondreams.org/views/101000-109.htm (last accessed June 20, 2004) (originally published in S.F. BAY GUARDIAN, Oct. 9, 2000) ("Exxon media flaks and other corporate 'spin masters' often call litigation 'frivolous' when they are defendants. What is truly frivolous is Exxon's legal foot-dragging in this case.").

[28] *Exxon*, 270 F.3d 1215. The Ninth Circuit found the award excessive under the expanded judicial review of punitive damages required by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (establishing three "guideposts" for reviewing such awards) and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (reaffirming the *BMW* guideposts), both of which were decided after the *Exxon* trial court had approved the jury's verdict. *Exxon*, 270 F.3d at 1241. On remand, the District Court reluctantly reduced the award to $4 billion. *In re* Exxon Valdez, 236 F. Supp. 2d 1043 (2002). In light of the U.S. Supreme Court's major ruling in April 2003 on the appropriate ratio of punitive damages, stating "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed . . . however . . . few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003), the Ninth Circuit once again vacated and remanded the *Exxon* punitive damages award. David Koenig, *Appeals Panel Sends Exxon Valdez Case Back To Alaska Court*, JUNEAU EMPIRE, Aug. 24, 2003, web posted, *available at* http://www.juneauempire.com/stories/082403/sta_exxoncase.shtml (last accessed

The polemic continued to crescendo after the *Exxon Valdez* award with every new large punitive damages verdict. The *Exxon Valdez* record was shattered in July 2000 when a Florida jury awarded $145 billion in punitive damages in *Engle v. R.J. Reynolds*, a landmark class action suit involving up to 700,000 Florida smokers.[29] *Engle* further incensed critics of the American tort law system.[30] Walter Olson, a leading critic of "over-litigation,"[31] proclaimed that "'The Runaway Jury' Is No Myth" and called the award "plunder."[32] The U.S. Chamber of Commerce criticized the *Engle* verdict as "an obscene symptom of a court system that is out of control."[33] Others called the trial "a circus" and a "kangaroo court."[34] At the other end of the spectrum, anti-smoking advocates hailed the *Engle* verdict as "the Day of Reckoning . . . for Big Tobacco['s] despicable and illegal behavior over the past half century."[35] More large punitive damages verdicts are inevitable and will inevitably refuel the debate.

The extreme rhetoric[36] and strong passions that characterize the popular discourse over punitive damages have spilled over into legal academia, generating lively symposia[37] and rich research, as well as nasty feuds,

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June 20, 2004).

[29] *See* Final Judgment and Amended Omnibus Order, Engle v. RJ Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Nov. 6, 2000), 2000 WL 33534572. *See also* Myron Levin, *Jury Awards $145 Billion in Landmark Tobacco Case*, L.A. TIMES, July 15, 2000, at A1. In comparison, the forty states that settled their Medicaid case against the tobacco companies in 1997-98 were to receive $246 million over twenty-five years. Milo Geyelin & Gordon Fairclough, *Taking a Hit: Yes, $145 Billion Deals Tobacco a Huge Blow, But Not a Killing One*, WALL ST. J., July 17, 2000, at A1. In 2003, the *Engle* punitive damages verdict was reversed on appeal. Matthew Haggman and Laurie Cunningham, *A Giant Win for Tobacco Industry*, LAW.COM, May 22, 2003, *available at* http://www.law.com/jsp/article.jsp?id=1052440772000.

[30] *See, e.g.*, *Voice of the Times*, ANCHORAGE DAILY NEWS, Nov. 9, 2001, at B9 (calling the award "ridiculously large and lawyer-driven," "bloated," and "pie-in-the-sky").

[31] Walter Olson, *Profile*, *at* http://walterolson.com/bio.html.

[32] Walter Olson, *'The Runaway Jury' Is No Myth*, WALL ST. J., July 18, 2000, at A22 [hereinafter Olson, *Myth*].

[33] Marc Kaufman, *Tobacco Suit Award: $145 Billion; Fla. Jury Hands Industry Major Setback*, WASH. POST, July 15, 2000, at A01.

[34] *Id.* (quoting Tom Humber, President, National Smokers Alliance, and Gordon Smith, lead attorney for Brown & Williamson Tobacco Corp., respectively).

[35] Press Release, Tobacco Products Liability Project, TPLP: *Engle Verdict Unlikely To Be Reversed on Appeal* (July 14, 2000), *available at* http://www.tobacco.neu.edu.litigation/cases/pressreleases/ENGLEVICTORY2000.htm (last accessed June 20, 2004).

[36] This article uses the term "rhetoric" in the sense of "[a]ffectation or exaggeration in prose or verse . . . [u]nsupported or inflated discourse," NEW COLLEGE EDITION, AMERICAN HERITAGE DICTIONARY 114 (1976), rather than the classical definition of "rhetoric," which is the "the study of the elements used in literature and public speaking." *Id.* For a thorough discussion of the rhetoric of the punitive damages debate, see Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71.

[37] *See, e.g.*, Robert A. Klinck, *Symposium: Reforming Punitive Damages: The Punitive Damages Debate*, 38 HARV. J. ON LEGIS. 469, 469 (2001) (describing the *Journal*'s March 2001 symposium as a response to the "controversy surrounding punitive damages"); *see also Special Issue: The Future of*

tumultuous fora, and claims of corrupt scholarship.[38] During the 1980s[39] and 1990s, in response to the vociferous criticism of tort verdicts generally,[40] and punitive damages in particular, a host of major empirical studies were published.[41] Studies by the Department of Justice,[42] RAND Institute,[43] Theodore Eisenberg,[44] and other leading scholars[45] responded to the

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Punitive Damages, 1998 WIS. L. REV. 1, 1-462 (presenting thirteen articles by leading scholars on punitive damages resulting from a controversial conference held at the University of Wisconsin Law School in 1996); Galanter, *Shadow Play*, *supra* note 5, at 1 (describing the conference and contributors).

[38] For example, claiming bias, tort reform leaders staged a partial boycott of the 1996 Wisconsin punitive damages conference. ATLA, *Late Boycott by Tort "Reform" Group Leaves ABA TIPS Section Leadership Dismayed at* www.atla.org/foundations/pound/cjdigest/9701/c97woyc.html (last accessed June 20, 2004). Galanter discusses the history of the conference, its participants, and his disappointment with the controversy, in his Introduction to the papers. Galanter, *Shadow Play*, *supra* note 5, at 1.

[39] The 1978 punitive damages verdict of $125 million in the Ford Pinto case marked a watershed in punitive damages history and scholarship. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 3 (1982) (discussing Ford Pinto case, "The recent affirmance of the verdict in *Grimshaw* demonstrates that the [changing judicial environment for punitive damages] is now in full swing .... There has been considerable ferment in this field in the last few years.").

[40] Under the Reagan Administration, the U.S. Department of Justice formed a Tort Policy Working Group, which ultimately made a strong recommendation for tort reform. OFFICE OF THE ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986). *See also* Thomas B. Marvell, *Tort Caseload Trends and the Impact of Tort Reforms*, 17 JUST. SYS. J. 193, 193 (1994) ("The mid-1980s saw considerable debate about an alleged litigation explosion in tort cases.") (citing Alice I. Youmans, *Research Guide to the Litigation Explosion*, 79 LAW LIB. R. J. 707 (1987)). *See also id.* (noting that "the U.S. Justice Department and insurance companies, who advocated tort reforms that would limit claims, argued that tort caseloads were rising greatly, and they supported research reaching that conclusion. ..."). The American Medical Association took "the lead in a 'crusade' for tort reform." S.Y. Tan, *The Medical Malpractice Crisis: Will No-Fault Cure the Disease?*, 9 U. HAW. L. REV. 241, 257 (1987).

[41] *See, e.g.*, Galanter, *Shadow Play*, *supra* note 5, at 1 ("Over the past dozen years a band of dedicated researchers has gradually assembled a picture of punitive damages activity along a number of dimensions."); Jane Mallor & Barry Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1001 (1999) (commenting that, since their 1980 article was published, "In fact, judicial, legislative, and scholarly interest in punitive damages has surged in the intervening period.") (citing Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980)). For a thorough discussion of the response of scholarship to the perceived crisis in the medical malpractice area, see Neil Vidmar, *Maps, Gaps, Sociolegal Scholarship, and the Tort Reform Debate*, *in* SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 170-209 (Patricia Ewick et al. eds. 1999). For a thorough review of results of the nine major empirical studies, see Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WISC. L. REV. 15, 17–56 [hereinafter Rustad, *Unraveling*].

[42] *See, e.g.*, CAROL J. DEFRANCES ET AL., U.S. DEP'T OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (Bureau of Justice Statistics Bulletin No. NCJ-154346 1995); CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (Bureau of Justice Statistics Bulletin No. NCJ-173426 1999).

[43] *E.g.*, ERIK MOLLER, RAND CORP., TRENDS IN CIVIL JURY VERDICTS SINCE 1985 (1996); Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283 (1999).

[44] *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 WAKE FOREST L. REV. 1129 (2001); Theodore Eisenberg

accusations that the tort system was "wacky"[46] and tried to keep apace of the various state and national tort reform proposals.[47] Trial lawyers seized on these studies as proof that the tort reformers' calls for caps and other limits on punitive damages were based on purely political agendas and not empirical evidence,[48] while tort critic Ted Olson dismissed the plaintiffs' bar's touting of the studies as "hype."[49]

Major corporations hit with large punitive damages awards, including Texaco, Exxon, and Honda, responded by funding studies by sympathetic scholars.[50] A much publicized new book—partially funded by Exxon and

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et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) [hereinafter Eisenberg, *Predictability*]; Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59 (1999); and Theodore Eisenberg, *Measuring the Deterrence Effect of Punitive Damages*, 87 GEO. L. J. 347 (1998).

[45] *See, e.g.*, DANIELS & MARTIN, *supra* note 7, at 29-59 *and* Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169 [hereinafter Koenig, *Shadow Effect*]. In 2001, leading empirical scholars Thomas Koenig and Michael Rustad published *In Defense of Tort Law*, THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001), a book with the "primary goal [ ] to cut through the rhetoric surrounding American tort law by presenting the best empirical research on the social functions of civil litigation." Thomas Koenig & Michael L. Rustad, *Book Review: In Defense of Tort Law*, *available at* http://consumerlawpage.com/article/tort-law.htm (last accessed June 20, 2004) (also stating that their book "is the first book to provide a systematic study of the positive functions of tort law in contrast to the anti-tort message of commentators such as Peter Huber, Victor Schwartz, and Walter Olson").

[46] Glaberson, *supra* note 6, at Section 4, 1 ("increasingly, some political scientists, legal scholars[,] and consumer advocates are suggesting that outlandish examples have created a distorted picture of the legal system").

[47] *See, e.g.*, Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1096 (2000) [hereinafter Eaton et al., *Georgia II*] (empirical study of tort litigation in Georgia, concluding that their study was "another brick in a wall of information that suggests that the tort system in practice is very different from the one depicted in popular and political rhetoric" and "[t]here is no explosion of tort filings," *id.*); *see also* Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627 (1996) [hereinafter Eaton & Talarico, *Georgia I*] (predecessor study, reaching similar conclusions); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 398 (1999) (concluding in an empirical study of twelve years of Ohio products liability and medical malpractices cases in a major county that "[c]urrent tort reform is a blunderbuss[, b]ased on anecdote and designed to favor defendants," and that "[i]n the face of this evidence[of] exaggerated anecdotes and wild stories . . . [r]ather than heed . . . those fictions, legislators and voters should turn their attention to our growing knowledge of how the tort system truly operates").

[48] *See, e.g., The Results Are In: When it Comes To Punitive Damages, Juries Award Less*, Association of Trial Lawyers of America, *available at* http://www.atla.org/homepage/pd0616.html (last accessed June 20, 2004) (discussing the 1996 Justice Department study, prepared by the Bureau of Justice Statistics and the National Center for State Courts and led by Eisenberg, that looked at 10,278 state court injury trials in the 75 largest counties in America).

[49] Olson, *Myth*, *supra* note 32, at A22 (noting with disdain that the "Web site of the Association of Trial Lawyers of America was 'still hyping recent studies that, it says, refute the "claim that punitive awards are out of control," and "reveal the 'runaway jury' claim to be a complete myth."'").

[50] Rustad, *Unraveling*, *supra* note 41, at 57-65 (discussing the Texaco, Exxon, and Honda studies).

other major corporations and conservative foundations—called *Punitive Damages: How Juries Decide* was published in 2002 by Cass Sunstein, W. Kip Viscusi, and other leading scholars, who criticized punitive damages for imposing high social costs on corporations and characterized the behavior of juries as erratic and unfair.[51] This new line of research was quickly championed by Exxon, among others, and urged upon the courts in ongoing litigation.[52] Viscusi's work also engendered a new round of provocative scholarly commentary[53] and ignited a larger debate about the growing trend of corporate funding for academic scholarship.[54] The controversy continues at

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[51] CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JURIES DECIDE *passim* (2002). In the preface of *Punitive Damages*, the authors gratefully acknowledge the financial support of ExxonMobil Corporation, the National Science Foundation, the Law and Economics Program at the University of Chicago, and the Olin Foundation. *Id.* at ix. They state that the funders did not interfere explicitly or implicitly with the content or conclusions of their studies, *id.* at ix-x, yet this unusual funding of the book has itself generated a new debate about academic bias. The book was warmly received by advocates of tort reform. *See* Bruce Fein, *All Rise, The Jury Is Deciding; Citizen Panels Arbitrarily Mete Out Punishments*, WASHINGTON TIMES, July 23, 2002, at A21 (reviewing the book and commenting that: "Their findings generally confirm the intuitive or anecdotal: that jury awards are erratic, hitting like lightening [sic] bolts; that juries favor local plaintiffs over carpetbaggers; that jurors routinely ignore the legal standards for punitive damages; that when injuries appear, no matter how serendipitous, jurors are inclined to find predictability by the defendant to alleviate plaintiff losses."). *Punitive Damages* received front page coverage in the *New York Times*. The article, *"Debate Grows On Jury's Role in Injury Cases,"* quoted Sunstein, Viscusi, and Eisenberg debating the sensibility of punitive damages in light of the pending appeal of the $290 million punitive damages verdict in the California Ford Bronco rollover case, in which the jury had awarded the "largest punitive award ever affirmed by an American court in a personal injury case." *See* Adam Liptak, *Debate Grows On Jury's Role In Injury Cases*, N.Y. TIMES, Aug. 26, 2002, at A1. For more examples of Viscusi's work in this area, see W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L. J. 285 (1998); *see also* W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 HARV. J. ON LEGIS. 139 (2002); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 342-44 (2001). For a discussion of Viscusi's extensive publications, see David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 395-98 (2002).

[52] Alan Zarembo, *Alaska Oil Spill: Funding Jury Research Has Served Exxon Well in Court*, THESUNLINK.COM, Dec. 4, 2003, *available at* http://thesunlink.com/redesign/2003-12-04/nationworld/338016.shtml (last accessed June 20, 2004) (stating that the "Exxon research" has provided "ammunition" to "industry leaders who live in fear of large awards and often campaign against them"); *see also id.* (noting that this "Exxon-funded research" was repeatedly cited by leading corporations who filed a brief in the *State Farm* case, *see supra* note 28, and countered by twenty-one academics who made a "lengthy attack on the studies").

[53] *See, e.g.*, Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 STAN. L. REV. 1821 (2000) (discussing Viscusi's scholarship); David Luban, *Responses: A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359 (1998), *responding to* W. Kip Viscusi, *Reply: Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998).

[54] *See* Richard Lippitt, *Intellectual Honesty, Industry and Interest Sponsored Professorial Works, and Full Disclosure: Is the Viewpoint Earning the Money, or Is the Money Earning the Viewpoint?*, 47 WAYNE L. REV. 1075, 1087-91 (2001) (discussing Viscusi's punitive damages scholarship underwritten by the Exxon and the Olin Corporation); *see also* Darryl K. Brown, *Law Schools and Corporate Influence: Money's Power To Shape Ideas and Opinions*, THE WITNESS (Sept. 2000), *available at* http://thewitness.org/archive/sept2000/brown.lawschools.html (last accessed June 20, 2004) (noting Viscusi

conferences[55] and in the literature.[56] This intense academic debate over punitive damages—with "disagreements at every level"[57]—is becoming more visible to the public and in the courts.

Even though these recent high profile studies have become ensnared in the polarized politics of tort reform, they represent important new efforts to reach a broader audience beyond the traditional boundaries of the academy and an attempt to bridge the longstanding gap between scholarship and tort policy. Marc Galanter, whose scholarship in the early 1980s initiated the probing empirical response of the legal academy to the tort "explosion" rhetoric, observed that public "perceptions of an eruption of pathological litigiousness are . . . a symptom of the weakness of contemporary legal scholarship."[58] The empirical information available on the tort system was, according to Galanter, "thin and spotty," and he urged legal scholars to take on the task of collecting data and developing coherent theories as "an inescapable collective responsibility of a group that purports to proffer expert opinions about the arrangements of public life."[59] Over a decade later, in 1992, Michael Saks continued to decry the "meager" data available on the behavior of the tort law system, but noted with chagrin that the "lack of evidence, which might seem like an insuperable barrier, has barely slowed down many policy-makers, scholars and other commentators," leading to "a picture of the litigation

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"turned out to be a strong opponent of punitive damages. Vicusi [sic] has received substantial sponsorship of his research from corporations such as Exxon."). *See also* Russell Mokhiber, *Exxon: Mean and Stupid*, THE MULTINATIONAL MONITOR (March 1999), *available at* http://multinationalmonitor.org/mm1999/mm9903.03c.html (last accessed June 20, 2004) (criticizing Exxon's funding of the studies as "mean and stupid").

[55] In March 2001, the *Harvard Journal on Legislation* held a symposium on "Reforming Punitive Damages," featuring many leading commentators and leaders on the issue. For a list of participants, see *News and Events, HLS Conference to Examine Punitive Damage Reforms, available at* http://www.law.harvard.edu/news/2001/03/12_legjournal.html (last accessed June 20, 2004) (including, *e.g.*, Marc Galanter, Walter Olson, Kip Viscusi, David Schkade, Neil Vidmar, and Mary Rose). *See also* the Winter 2001 symposium issue published by *Wake Forest Law Review, Engle v. R.J. Reynolds Tobacco Co.: Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making*, 36 WAKE FOREST L. REV. 871, 871-1198 (2001) (featuring seven articles by leading scholars).

[56] *See, e.g.*, Reid Hastie & W. Kip Viscusi, *Juries, Hindsight, and Punitive Damages Awards: Reply to Richard Lempert*, 51 DE PAUL L. REV. 987 (2002) (responding to Lempert's criticism of Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998), published as Richard Lempert, *Juries, Hindsight and Punitive Damages Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867 (1999)); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002)(focusing on the mismatch of proposed reforms with the psychology of actual jury behavior in awarding punitive damages).

[57] Robert A. Klinck, *Symposium: Reforming Punitive Damages: The Punitive Damages Debate*, 38 HARV. J. ON LEGIS.. 469, 470 (2001) (characterizing the state of punitive damages scholarship).

[58] Galanter, *Landscape of Disputes, supra* note 4, at 5.

[59] *Id.* at 71. *See also* Galanter, *Antidote*, *supra* note 7, at 1098 (noting 1994 articles by himself and Deborah Hensler that called for "cultivating a stronger knowledge base").

system that is built of little more than imagination."[60] In 1998, Michael Rustad argued that having the data in hand for the policy debate was vital: "Before radically restructuring tort law, legislators need reliable, comprehensive empirical studies of the functioning of punitive damages."[61] Stephen Daniels and Joanne Martin, authors of several of the major studies, posited that empirical research is a "powerful alternative to the tactical use of passion and the false hope of an imaged past."[62] Even the authors of *Punitive Damages* advocated that legislative or judicial changes in punitive damages law "be based on accurate, rather than fanciful, understanding of jury behavior."[63]

Yet, despite the universal recognition of the need for a public debate better informed by empirical data, Galanter suggests that "[t]he emerging cumulative picture of the workings of the legal system that has been produced by 'law and society' scholars and institutions has been seldom welcomed, occasionally resisted, and usually ignored by proponents of the jaundiced view."[64] Rustad attributed the split in views to "looking at different parts of the same elephant," characterizing the tort reformers' rejection of the empirical data as simply "serv[ing] their own political agenda."[65] Perhaps the controversy over the corporate funding of *Punitive Damages* supports Rustad's doleful conclusion that "conflict between science and advocacy is irreconcilable."[66]

This article suggests that reconciliation is not hopeless, but that "being empirical" in a new way is vital to resolving the conflict.[67] The empirical knowledge base about punitive damages specifically, and jury verdicts generally, has grown exponentially in recent years and fostered dynamic legal scholarship. Yet, is this rich scholarship reaching the real world in a way that fosters consensus instead of further polarization? Are policymakers or the public listening to anything more than the reductionist media sound-bites from either "side" of the debate?[68] To be effective, empirical scholarship

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[60] Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA L. REV. 1147, 1154-56 (1992).

[61] Rustad, *Unraveling, supra* note 41, at 16.

[62] Daniels & Martin, *supra* note 36, at 100.

[63] SUNSTEIN et al., PUNITIVE DAMAGES, *supra* note 51, at vii.

[64] Galanter, *Shadow Play, supra* note 5, at 13.

[65] Rustad, *Unraveling, supra* note 41, at 55.

[66] *Id.*

[67] *See* Heise, *supra* note 3, *passim* (emphasizing the need for empirical over anecdotal legal scholarship).

[68] Neil Vidmar's review of sociolegal scholarship and the tort reform debate also questions "whether anyone in a position to make policy listens," noting striking examples of where courts have rejected, misinterpreted, or ignored social science findings, but also recounting that the Illinois Supreme Court

must be contextual and communicative, not just statistical. Those interested in tort reform should be encouraged to view the critique of punitive damages in the context of the multi-dimensional layers of law and society and place—jurisprudential history, legislative developments, doctrinal landscape, verdicts statistics, case narratives, and tort caseload trends. Even if incomplete, once woven together, these related strands can create a much richer foundation for engaging in productive debate over reform. Although the punitive damages scholarship is prolific, deep, and varied, many of the large studies present dry empirical meta-data without providing a multi-dimensional analysis, what this article calls "integrated empiricism." In his seminal 1986 article *The Day After the Litigation Explosion*, Galanter effectively used four "vivid illustrations" to show some of the "beneficial effects of litigation" and to "balance the anecdotal stock" of the tort reform movement,[69] but the dominant response of the scholarship that followed Galanter's seminal work was quantitative and theoretical, rather than narrative or contextual.

There are indications, however, that punitive damages scholarship may be moving in this new direction.[70] A 2001 study of Florida punitive damages awards by Neil Vidmar and Mary Rose appears to be the first avidly contextual study of punitive damages.[71] Vidmar and Rose examined Florida

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considered affidavits from himself, Galanter, Daniels, and Martin that "discussed researching findings contradicting empirical assertions in the legislative record associated with passage" of Illinois' tort reform act in 1995, which the court held was unconstitutional. Vidmar, *Maps, Gaps*, *supra* note 41, at 202. Several of the major empirical scholars recount how their work has been increasingly noticed by the courts and used by parties in appeals of punitive damages awards. *See, e.g.*, Thomas H. Koenig and Michael L. Rustad, *Book Reviews: In Defense of Tort Law*, THE CONSUMER LAW PAGE, *available at* http://consumerlawpage.com/article/tort-law.htm (last accessed June 20, 2004) (noting that the Supreme Court referred to Koenig and Rustad's study in the *Honda* case, and that "our biggest impact has been in the courts"). The recent *Punitive Damages* book has also already been influential, invoked by judges in ten cases since 1999. Zarembo, *supra* note 52.

[69] Galanter, *The Day After*, *supra* note 8, at 29-31.

[70] In outlining areas that needed further research in his 1998 article *Unraveling*, Rustad repeatedly suggested a need for more information on "factual foundation" and "circumstances" that lead to awards. Rustad, *Unraveling, supra* note 41, at 68.

[71] Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and In Reality*, 38 HARV. J. ON LEGIS. 487 (2001). Vidmar and Rose's study is the only published study found that focused on a state's entire experience with punitive damages awards. A study on California punitive damages verdicts from 1991-2000 by Professor J. Clark Kelso, at McGeorge School of Law, and Dr. Kari C. Kelso was, apparently, never published. *An Analysis of Punitive Damages in California Courts, 1991–2000* (2001) (unpublished manuscript, Capital Center for Government Law & Policy, University of the Pacific, McGeorge School of Law), *available at* http://www.mcgeorge.edu/government_law_and_policy/publications-/cccglp_pubs_punitive_damaves_report.PDF (last accessed June 20, 2004). That study, underwritten by a grant from the Civil Justice Association of California, "one of the leading proponents of punitive damage and civil justice reform in California," *id.* at 1 n.1 (funding which the authors claimed did not influence their study), studied 489 punitive damages awards between January 1991 and December 2000.

Three other studies of state experiences have focused more broadly on all tort cases. A study of all

punitive damages verdicts from 1988 to 2000, using data extracted from the *Florida Jury Verdict Reporter*. They focused on the reform efforts of the Florida Legislature and set their empirical data on awards into two important qualitative contexts: first, by breaking down verdicts into topical categories and, second, by providing a sampling of factual narratives from the cases studied. As a result of this multi-dimensional approach, their responses to claims by tort reformers in Florida about "out of control" punitive damages are much more persuasive than if they had presented only the meta-data. The Hawaii study presented in this article builds on this contextual approach by focusing on the similar tort reform pressures on the Hawaii Legislature, presenting the meta-data on Hawaii punitive damages judgments for a seventeen-year period (1985–2001), then segregating the data by topical case category and providing case narratives. This parallel approach allows some useful comparisons between the punitive damages experiences of two jurisdictions at the far-flung ends of the United States. Some striking similarities are found between the two studies.

Building on Vidmar and Rose's approach, this article adds contextual layers to the analysis,[72] slicing the data in a wider variety of ways to probe the critique of punitive damages from more varied quantitative perspectives, and presenting historical, doctrinal, and caseload trend information for the entire jurisdiction. The study also provides access to all of the narratives for the reported punitive damages judgments in Hawaii, not just a sample. Although a perfectly integrated approach that considers every aspect of punitive damages awards in any jurisdiction is perhaps impossible, the goal of this article is, nonetheless, to move the scholarship in this new direction. The article presents the Hawaii data within the framework of a more complex, albeit imperfect,[73] model of empirical integration, weaving together many of

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products liability and medical malpractice verdicts in Franklin County, Ohio over a twelve-year period used a similarly detailed multi-dimensional empirical approach, but it did not include case narratives and did not analyze punitive damages because none were reported. Merritt & Barry, *supra* note 47, at 315. Merritt and Barry generally found that, contrary to the claims made in high-profile headlines, the jury verdicts in these two kinds of cases in Ohio were "modest," *id.* at 315, and rates and verdict size had been declining. *Id.* at 319. The other two studies were both led by Thomas A. Eaton, of the University of Georgia School of Law, who examined tort verdicts in certain Georgia counties in the mid-1990s. *See* Eaton & Talarico, *Georgia I, supra* note 47, *and* Eaton, et al., *Georgia II, supra* note 47.

[72] Contextual analysis is a natural complement to statistical methods. *See* Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 158 (2002) (vigorously disagreeing with a "resolutely externalist approach to legal scholarship" and defending the value of non-empirical legal scholarship).

[73] *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 49, 50 (2002) ("All knowledge and all inference in research is uncertain," and the researcher's challenge is to "estimate [and reveal] the degree of uncertainty inherent in each conclusion") [hereinafter Epstein & King, *Rules*]. One of the imperfections in this study is that, even though it attempts a fairly complete integration of what it

the most significant factors that affect the landscape of any state's punitive damages system, using transparent methodologies[74] and web-accessible data,[75] that can be duplicated in other jurisdictions and enhance future comparative analyses.

The Hawaii study examines the complete universe of 2,250 state and federal tort judgments in Hawaii from 1985 to 2001, which produced sixty-three punitive damages judgments.[76] The analysis uses seven viewpoints:

1) jurisprudential/historical (addressing the development of Hawaii tort law in the courts),

2) doctrinal (analyzing the background principles of punitive damages unique to Hawaii),

3) legislative/political (discussing the legislative influence on state tort law and pressures for statutory punitive damages reform),

4) quantitative/horizontal (looking across the entire state and federal court system in Hawaii, including Hawaii's mandatory arbitration system for lower-value tort cases),

5) quantitative/longitudinal (viewing the data over a long time period, seventeen years),

6) qualitative/vertical and categorical (examining the facts of the cases that produced the trial court verdicts), and

7) socio-economic/systemic (considering overall trends in Hawaii tort caseloads, population, and economic information).

Although Hawaii is the most geographically isolated archipelago in the

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known about the punitive damages and tort system in Hawaii, it does not fully use an interdisciplinary approach, falling short of the third goal for empirical research advocated by Epstein, King, and others. *See* Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135, 150 (2002) ("legal researchers should take advantage of and build upon the considerable body of research on law found in other disciplines, such as political science, economics, and the behavioral sciences").

[74] This study attempts to follow the basic rule that research should be replicable to ensure its integrity. *See* Epstein & King, *Rules*, *supra* note 73, at 38, 42-44 (critiquing empirical legal scholarship and suggesting rules for methodology). *See also* Cross, Heise & Sisk, *supra* note 73, at 135 (strongly criticizing Epstein and King's own methodology but agreeing that their "discussion of research methods provides a very helpful guide for those who produce and consume empirical legal research, both quantitative and qualitative"); *see also id.* at 150 (agreeing with Epstein and King that "articles should be fully transparent in their procedures and claims, which necessarily requires that researchers use more rigor in presenting their methodology and inferential claims").

[75] *See* Epstein & King, *Rules*, *supra* note 73, at 131-32 (urging legal scholars to provide better access to data underlying their empirical studies to allow evaluation and encourage others to build on that research).

[76] This article uses the term "judgment" to mean jury or judge awards or verdicts that have been approved by the trial court. The term "awards" is used for Hawaii's Court-Annexed Arbitration Program ("CAAP") decisions, which are then later administratively approved by the circuit court, absent a notice of appeal.

world and one of the smallest states (with a fairly stable population of only 1.2 million),[77] Hawaii courts have a distinctly activist reputation and have often been on the cutting edge of national tort doctrine. Hawaii has also produced several large punitive damages verdicts,[78] including the record-breaking $1.2 billion punitive damages award in February 1994, rendered seven months before the *Exxon* verdict, against the estate of deposed Philippines dictator Ferdinand Marcos.[79] Consequently, the state has not

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[77] Hawaii's population was roughly ten times smaller than Florida's population during the time periods covered in the two studies. *See* Vidmar & Rose, *supra* note 71, at n.19 (noting Florida population figures, ranging from 12.89 million to 14.71 million).

[78] Other than the 1994 *Hilao* verdict (a federal court class action, *see infra* note 79), the largest punitive damages judgments in Hawaii state tort cases include:

(1) The $4.78 million punitive damages award in Takaki v. Tavares, *see discussion infra* p. 289, *aff'd sub nom* Takaki v. Cambra, 56 P.3d 732 (2002), a 2001 Honolulu judgment. The jury awarded compensatory damages of $400,000 for intentional infliction of emotional distress to a husband, wife, and daughter who suffered bankruptcy and loss of their home after Mr. Takaki's film production truck was deliberately burned to the ground by George Cambra, a competitor in the movie production business in Hawaii, who later pled guilty to arson and then conspired to hide his assets (*see Takaki*, Case S39, Appendix B, p. 347). *See also* Curtis Lum, *Film Arson Verdict Challenge Likely*, HONOLULU ADVERTISER, Mar. 1, 2001 at B2.

(2) The $11.25 million punitive damages award to a young man rendered a quadriplegic in the *Masaki* products liability case, which was reversed and remanded by the Hawaii Supreme Court in *Masaki v. General Motors, Inc.*, 780 P.2d 566, *rec'n denied*, 833 P.2d 899 (1989) (*see Masaki*, Case S16, Appendix B, p. 366);

(3) A $14.27 million punitive damages verdict in 1995, upheld in 1997 by the Hawaii Supreme Court in *Kawamata Farms, Inc. v. United Agri Products*, 948 P.2d 1055 (1997), against DuPont in a tort case involving property damage to farmers on the island of Hawaii who used Benlate that killed or damaged their flower and vegetable crops. Because this case involved property damage and not personal injury, it was not reported in *Personal Injury Judgments Hawaii* and not included in this article's study of Hawaii punitive damages verdicts. *See* Hugh Clark, *$23 Million Awarded To Big Isle Farmers*, HONOLULU ADVERTISER, Jan. 27, 1995, at A3 (reporting a total state court jury verdict of $23.85 million: $12.5 million in punitive damages and $8.39 million in compensatory damages to plaintiff STT Farms of South Kona; and $1.77 million in punitive damages and $1.8 million in compensatory damages to Kawamata Farms of Waimea); and

(4) A 1980 verdict by a Honolulu jury awarding $21 million in punitive damages and $7.4 million in compensatory damages to the surviving families of two workers who died, and six others who were injured, in a explosive fire at the Chevron and Shell Oil storage facilities in Honolulu. Interview with University of Hawaii Law Professor Eric Yamamoto (Mar. 20, 2001) (Professor Yamamoto served as one of the defense counsel in the case); *see* Mary Adamski & Harold Morse, *'Mass Explosion' Averted From Fire At Tesoro Refinery*, HONOLULU STAR-BULLETIN, Aug. 14, 1999, at A1. The case settled in 1984 for $15 million. *See Quick Facts on Chevron in the USA*, PROJECT UNDERGROUND, *available at* http://www.moles.org/ProjectUnderground/motherlode/chevron/chevron1.html. Because this verdict predates the first volume of *Personal Injury Judgments Hawaii*, it is also not included in this article's study.

[79] Two tort verdicts by Honolulu juries, one in 1994 and one in 1996, which both involved the brutal dictatorship of former deposed Philippine President Ferdinand Marcos, set "world records." *See* Walter Wright, *Four Groups Seek Marcos Money*, HONOLULU ADVERTISER, Feb. 24, 1994, at A3 (quoting Melvin Belli, Sr., one of the victims' lawyers, referring to *Hilao* as "the biggest personal injury verdict in the world"). After decades of notorious dictatorial rule, Marcos fled to Hawaii in 1986 to escape the revolution against his government. Estate of Marcos Human Rights Litigation, 910 F. Supp. 1460, 1462-63 (D. Haw. 1995). Marcos died while the lawsuits were pending and his Estate was substituted as the defendant. *Id.* at 1462.

escaped the strong winds of national tort reform.[80]

Like other state legislatures, the Hawaii Legislature has long been under a steady stream of local and national pressure to enact strict reforms to the state tort law system, including caps and other limitations on punitive damages.[81] Despite intense lobbying by tort reform proponents, however, Hawaii has not yet enacted any statutory modifications to its longstanding common law doctrine allowing punitive damages awards. The conflicted views about punitive damages in Hawaii were reflected in the State's landmark case on punitive damages, the 1989 *Masaki* case, which simultaneously heightened the plaintiff's burden of proof to the highest civil standard of "clear and convincing,"[82] yet strongly endorsed punitive damages awards generally and approved them specifically for products liability cases. The punitive damages

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In the first case, a Honolulu jury awarded $1.2 billion in punitive damages against the Marcos Estate for the mass torture of over 10,000 victims. *Id.* at 1464. The Ninth Circuit Court of Appeals upheld the award even though the punitive damages award was made before the compensatory award, which the Estate challenged under the *BMW* guideposts. Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996).

Almost a decade later, whether these record-setting judgments will ever be paid is still in doubt, given the significant complexities facing these and other actions seeking to locate and recover funds from the Marcos Estate. *See* Walter Wright, *Manila At Odds With Marcos Victims Over Funds*, HONOLULU ADVERTISER, Apr. 30, 1995, at A2 (reporting that $475 million of Marcos' fortune discovered in a Swiss bank account was being claimed by the new Philippine government for agrarian reform); Sherry P. Broder & Jon M. Van Dyke, *Marcos Saga To End With Pay For Victims*, HONOLULU ADVERTISER, Feb. 25, 1996, at B3 (editorial by plaintiffs' counsel noting efforts to secure the award despite how the Estate "cleverly hid their assets"); Mary Adamski, *Attorney for Marcos Victims Can Seek out Assets, Judge Told*, HONOLULU STAR-BULLETIN, Sept. 3, 1997, at A5 (noting plaintiffs' struggle to collect the award); Mary Adamski, *Marcos Family Agrees To Pay $150 Million*, HONOLULU STAR-BULLTIN, Feb. 25, 1999, at A1 (discussing $150 million settlement agreement); Lori Tighe, *$150 Million Settlement In Marcos Suit Bittersweet*, HONOLULU STAR-BULLETIN, Apr. 30, 1999, at A2 (discussing victims' reactions to settlement); Associated Press, *Marcoses get extension on $150 million penalty*, HONOLULU ADVERTISER, Mar. 3, 2000, at B2 (noting the Marcos' family's failure to deposit the funds for the settlement).

The second case, also involving the horrors of the Marcos regime, did not involve a punitive damages award explicitly, but did set a civil verdict record. In 1996, a Honolulu jury awarded the estate of a Philippine national treasure hunter a $22 billion compensatory award for the Marcos regime's brutality toward and kidnapping of plaintiff, and the theft of his pure gold Buddha, gold bars, coins, diamonds, and a roomful of gold bullion. Roxas v. Marcos, 969 P.2d 1209 (1998) (affirming in part, reversing in part). *Roxas* appears to be the largest civil jury verdict ever reported until *Engle (see supra* note 6 discussing *Engle)*.

Unlike *Exxon* and *Engle*, however, the *Marcos* verdicts caused no visible consternation among tort law critics and seemed to enjoy popular approval, most likely because Marcos was globally notorious for his brutal dictatorship and ultimately had few powerful defenders in the United States. *See, e.g.*, Editorial, *Marcos Judgment: Record Award in Rights Case*, HONOLULU ADVERTISER, Feb. 24, 1994, at A10 ("Whether or not they ever receive any money . . . [t]he magnitude of the award is commensurate with the crimes of the Marcos regime -- and a warning to other dictators").

[80] *See* Part III *infra* (discussing legislative history of tort reform); *see also* Randall H. Endo, *Recent Development, Punitive Damages in Hawaii: Curbing Unwarranted Expansion*, 13 U. HAW. L. REV. 659 (1991) (noting that the "sheer size" of the *Masaki* verdict in 1988, even though reversed on appeal, *see supra* note 78, "renewed interest in the issue of punitive damages").

[81] *See* Part III *infra*.

[82] *See Masaki*, 780 P.2d 566.

polemic is as vibrant in America's tropical paradise as it is in the rest of the country.

Although an empirical study of Hawaii punitive damages judgments has long been needed,[83] none had been done prior to 1998, when the author of this article conducted a preliminary survey of punitive damages judgments in the state circuit courts as part of a study group formed by the Hawaii Legislature.[84] The study presented in this article substantially refines that preliminary work and seeks to present a more comprehensive and accurate study of Hawaii punitive damages data. From a scholar's perspective, Hawaii's small size has many advantages. Hawaii shares many of the salient doctrinal characteristics of punitive damages law with other states,[85] allowing appropriate comparison to other jurisdictions. Yet, the state is small enough to permit analysis of the complete universe of tort verdicts, allowing an examination of an entire state's modern experience with punitive damages and eliminating the need for sampling.[86] The sixty-three punitive damages judgments in Hawaii over the past seventeen years is low in absolute terms compared, for example, to the total of 208 reported in the Florida study over a shorter time period.[87] This low "n" limits the inferences that can be drawn about causation and future behavior of the punitive damages system in Hawaii or elsewhere.[88] Considering population differences, however, the relative number of Hawaii punitive damages judgments is quite comparable to other

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[83] *See* Endo, *supra* note 80, at 686 ("Hawaii should conduct an empirical study of punitive [damages] awards in Hawaii's courts.").

[84] *See* discussion of Hawaii Tort Law Study Group, Part III C *infra*. The author also supervised a limited empirical review of punitive damages awards in Hawaii by then law student Greg Takase for a writing seminar in Spring 1997.

[85] *See* Part II *infra*.

[86] The Merritt and Barry study of Ohio verdicts observes that one limitation of prior studies of products liability and medical malpractice verdicts is that the prior studies "fail either to examine all jury verdicts within a jurisdiction or to include sufficient control variables to support complex analyses." Merritt & Barry, *supra* note 47, at 318 n.7. Because of the relatively small number of punitive damages judgments involved, this study does not use the array of more sophisticated quantitative methodologies used for large-number studies (except for some use of linear regression trend lines) or for inferential studies based on samples. Whether the data presented could benefit from more complex statistical techniques is a question left for further study.

[87] Vidmar & Rose, *supra* note 71, at 492 (Table 1) (total of column 3) (1989-1998).

[88] Lee Epstein & Gary King, *Reply*, 69 U. CHI. L. REV. 191, 207-08 (2002) [hereinafter Epstein & King, *Reply*] ("Applying the rules of inference is not always easy in any particular project, and perfection is normally out of the question. So what do we ask? We ask that the rules be understood, and that . . . uncorrected methodological problems be flagged for readers and an appropriate amount of additional uncertainty be added to one's conclusions."). For example, all of the trend lines for the judgments data, *see infra* Part IV, have low coefficients of determination (R^2), well below the normally acceptable level of .70, which makes confident projections of trends impossible even though the trend lines are informative in characterizing the existing data.

states,[89] suggesting that comparison is a worthy exercise.[90] Hawaii's small-state experience may provide a more complete public story about punitive damages than is possible in large states. A focus on more isolated state jurisdictions like Florida and Hawaii is also meaningful because state courts, not federal courts, are the dominant theater for tort trials.[91] The empirical studies to date have found substantial variation in the incidence of awards among the geographic areas studied.[92] According to Galanter, these variations "from Place to Place," reflect "an aspect of local legal culture that is little understood."[93] Thus, a focus on the nuances of a particular jurisdiction is imperative. By presenting an integrated empiricism model that can complement existing empirical studies on punitive damages, this article seeks to make the debate over punitive damages more sane, more honest, and more accessible to skeptical legislatures and popular audiences, who too often see the tort world in extremes colored more by anecdote than fact.[94]

One final preliminary observation about this study bears mention here. There is, without doubt, wide room for disagreement on the ultimate place of punitive damages in the American tort law system.[95] This article does not advocate or denounce any particular reform proposal, but rather seeks to use a variety of tools to explain what we know and do not know about punitive damages judgments in one state system, so that the debate can move away

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[89] *See* Part IV D & E *infra*.

[90] For the same time period reported by the Florida study, 1989-1998, in Hawaii state courts (not including CAAP), there were a total of fourteen punitive damages verdicts (State Chart 1,*infra*, p. XX). Considering the eleven punitive damages awards under CAAP (which would otherwise be channeled through the state court system, *see* CAAP Chart 1, *infra*, p. XX, but most likely would have generated fewer verdicts), the comparable Hawaii "state court" total for this period is 25. Inflating this by a factor of ten to account for the difference in total population, *see supra* note 77, this equates to 250 punitive damages judgments, surprisingly close to the 208 reported in the Florida study.

[91] *See* Galanter, *The Day After*, *supra* note 8, at 6 (noting that "[m]ore than 98% of all civil cases are filed in the state courts").

[92] Galanter & Luban, *supra* note 5, at 1413 (citing the Daniels and Martin study's findings).

[93] Galanter, *Antidote*, *supra* note 7, at 1128 (noting the variations in jurisdictional data found in prior studies); *see also* Galanter, *Shadow Play*, *supra* note 5, at 2 (noting "great local variation and a rough regional pattern" in the incidence of punitive damages).

[94] In this regard, this Hawaii study echoes the sentiments expressed in similar studies of state tort verdicts in Eaton et al., *Georgia II*, *supra* note 47, at 1098 ("These observations, of course, do no mean that all tort and civil litigation reform is unwarranted or unwise. There may be good reasons independent of the 'litigation explosion . . . runaway jury' myth to modify existing legal rules. The policy debate regarding proposed changes, however, should be honest and grounded in an accurate picture of what actually transpires in our nation's courts. We hope that our study contributes to a better understanding of that picture.") and Ohio, Merritt & Barry, *supra* note 47, at 398 ("Rather than heed those fictions, legislators and voters should turn their attention to our growing knowledge of how the tort system truly operates.").

[95] Even Galanter favors limited reform of the punitive damage system. Acknowledging that punitive damages should not be "utterly discretionary and without limits," Galanter and Luban propose that juries be required to provide a "plausible rationale for the size of punitive awards," but that courts give those justifications "a large dollop of judicial deference." Galanter & Luban, *supra* note 5, at 1461.

from the rhetorical poles and toward informed dialogue. Although true neutrality, even for the empirical scholar, is unobtainable,[96] and "[i]t is certainly true that statistics can 'lie' and perhaps even do so badly,"[97] the goal of neutrality is worth pursuing, and the transparency of the methodologies presented in this article can provide an objective check on this attempt to "just present the facts." The empirical approaches used in this article may be "instances [where] advancements in knowledge creep incrementally,"[98] but such incremental steps may be the only viable path toward shedding some new "light on old legal issues."[99] Even though no amount of empirical scholarship will convince everyone to adopt a particular resolution of a controversial issue,[100] empirical research can "be useful for helping to make public policy, for learning about the world for its own sake, or for helping to inform the normative debate."[101]

Part I presents the jurisprudential context of the Hawaii punitive damages study by sketching the political and legal roots of Hawaii's judicial system and examining the development of the predominantly liberal jurisprudential trends in Hawaii tort law. Part II focuses on Hawaii's broad judicial standards for punitive damages. Part III reviews the history of tort reform pressures on the Hawaii Legislature, including numerous specific proposals for changing Hawaii's punitive damages law. Part IV presents the quantitative portion of the Hawaii punitive damages study including all tort judgments from 1985–2001. The data are presented to respond to the common critiques of, and proposals to reform, punitive damages in Hawaii. Data on Hawaii tort caseloads, population, and economic trends are also presented to provide additional context for the analysis of the punitive damages data. Part V

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[96] *See* Heise, *supra* note 3, at 814 ("It is at least hoped that empirical scholarship can more easily separate the normative from the descriptive and better maintain neutrality. Of course, this remains just a hope. It is perhaps unavoidable that research questions are posed for a reason and that 'all measurement is lightly or heavily scented with the values of those whose hands who are on the switch.' However, empirical legal scholars, or at least the best of them, endeavor to approach their research questions objectively and their methodology of empirical choice facilitates as much objectivity as is humanly possible.").

[97] *Id.* (citing MARK TWAIN'S AUTOBIOGRAPHY 246 (1924) ("There are three kinds of lies: lies, damned lies, and statistics.")).

[98] *Id.* at 834 ("In most instances advancements in knowledge creep incrementally, and often in painstakingly slow fashion. Moreover, such nibbles constitute the bulk of empirical research.").

[99] *Id.* (noting that empirical legal research "speaks to issues that the more traditional theoretical and doctrinal genres cannot reach").

[100] *See, e.g.*, SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 29 (Patricia Ewick, Robert Kagan & Austin Sarat eds., 1999) ("Social science information competes with anecdote, horror story, and myth for the attention of policymakers. What we offer is complexity and often increased uncertainty. This is hardly the stuff to win friends when decisions have to be made and sides have to be taken.").

[101] Epstein & King, *Reply*, *supra* note 88, at 193-94.

complements this quantitative data by applying qualitative methods of case coding and case narratives. Part VI concludes by discussing the contributions that integrated empiricism can make to the punitive damages polemic in Hawaii and nationwide. The forty-four Charts of the quantitative data referred to in this article are included at the conclusion of the text, followed by the thirteen Tables that analyze the qualitative data, and then Appendices A (sample verdict forms) and B (narratives of all sixty-three punitive damages judgments in the study) are presented.

I. THE JURISPRUDENTIAL CONTEXT: TORT LAW IN HAWAII

Although direct comparisons between empirical data on punitive damages and general legal-historical background "data" are perhaps impossible, an examination of punitive damages judgments in any jurisdiction may be incomplete without knowing the broad contours of that legal system's character and its historical approach to tort law. To understand the big-picture framework within which Hawaii's punitive damages system operates, it is important to review briefly the general jurisprudential history of Hawaii's legal system and the State's historically liberal tort doctrine. In Hawaii, these two foundational layers suggest a judicial environment for punitive damages that is strongly pro-plaintiff in orientation, perhaps more so than any other state. Based on historical and jurisprudential context alone, one might expect higher and more frequent punitive damages judgments in Hawaii than in other states. And, if the rhetoric of many legislative proposals that have been introduced in the Hawaii Legislature on punitive damages in recent years is to be believed, Hawaii has a serious problem with "out of control" punitive damages judgments. If true, perhaps the judgments are simply a byproduct of the state's liberal legal context. Yet, the analysis later in this article indicates that, in Hawaii, even though the state's liberal jurisprudential context undoubtedly provides a rich growth medium for punitive damages judgments, the relatively low number, frequency, and size of punitive damages judgments indicates that this strong contextual influence is either not significant or is countered by other factors.

A. The Legal and Political Roots of Hawaii's Judicial Landscape

Hawaii's legal history is unique among American states because it blends ancient Native Hawaiian social custom and more recently introduced Western law. It is also unique because its modern development has been heavily influenced by the rich cultural history of the state's immigrant populations. Hawaii's judiciary traces its roots to the customs and oral traditions of the

islands' indigenous population of Native Hawaiians, who, for more than one thousand years before Western influences, lived according to an "elaborate system of rules of behavior and codes of conduct known as *kapu* and *kanawai*."[102] The arrival of Captain Cook in 1778 began a flood of contact with the West that irreversibly changed the ancient social structure.[103] With the advent of the independent Hawaiian Kingdom in 1810, King Kamehameha I issued proclamations creating the first criminal laws.[104] His son Liholiho (Kamehameha II) and his premier Queen Kaahumanu abolished the longstanding *kapu* system, and with the missionaries' arrival in 1820, western law was further introduced to the islands.[105] Formal enactment of written laws began in 1827, and justices of the people were appointed the following year.[106] In 1839, the Kingdom adopted a Declaration of Rights and Laws, and, a year later, King Kamehameha III adopted the first constitution, setting forth the framework of island governance.[107]

The Kingdom of Hawaii modeled its law and government after England and the United States but also explicitly incorporated into the Hawaiian Constitution that earlier law "fixed by Hawaiian judicial precedent or established by Hawaiian national usage."[108] In 1847, an independent judiciary was created, moving the supreme judicial power from the king, premier, and chiefs to a Western-style structure.[109] After the tumultuous events of the illegal overthrow in 1893 of the last Hawaiian monarch, Queen Liliuokalani, and forced annexation to the United States in 1898, the Hawaii Organic Act of 1900 made Hawaii a Territory of the United States whereby it "formally, symbolically, accepted Anglo-American traditions of law and justice."[110] The shift toward Western-dominated governance, including the adoption of a private property ownership system through the Great Mahele of 1848, was

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[102] Lani Ma'a Lapilio, *The 19th Century Hawaiian Judicial System*, 1999-Oct. HAW. B.J. 86 (1999). *Kapu* means "taboo, prohibition" and *kanawai* means "law, code, rule." MARY KAWENA PUKUI & SAMUEL H. ELBERT, NEW POCKET HAWAIIAN DICTIONARY 51, 53 (1992).

[103] Lapilio, *supra* note 102, at 86.

[104] STATE OF HAWAII JUDICIARY, ANNUAL REPORT 5 (1981-1982). King Kamehameha I conquered most of the islands in 1795 and established the Hawaiian Kingdom in 1810. *See also* Lapilio, *supra* note 102, at 86.

[105] Lapilio, *supra* note 102, at 86.

[106] STATE OF HAWAII JUDICIARY, *supra* note 104, at 4; Lapilio, *supra* note 102, at 86.

[107] STATE OF HAWAII JUDICIARY, *supra* note 104, at 4. The later Constitution of 1852 laid the foundation for the current structure of the Hawaii judicial system, including establishment of the circuit courts. *Id.*

[108] *Id.* This provision later became the first section (§ 1-1) of the Revised Laws of Hawaii (the precursor to Hawaii Revised Statutes). *Id.*

[109] Lapilio, *supra* note 102, at 87.

[110] STATE OF HAWAII JUDICIARY, *supra* note 104, at 4. The Organic Act also restructured the Hawaiian judiciary and legal system, creating the framework for the modern courts. Lapilio, *supra* note 102, at 88.

profound and often conflicted with Native Hawaiian traditions.[111]

The 20th Century saw another fundamental shift in the social fabric that greatly influenced the development of a liberal common law in Hawaii. In the early to mid-1900s, the political system in the Territory was controlled by *haole*[112] Republicans. This elite owned or leased "the bulk of the Islands' productive land and water rights"[113] and, according to one account, "Republican politics in Hawaii was little else but the politics of business, big business."[114] Simultaneously, immigrants from China, Japan, and the Philippines dramatically altered the ethnic mix of the islands.[115] The attack on Pearl Harbor on December 7, 1941, and the monumental impact of World War II on Hawaii, including five years of strict martial law, brought tremendous social and political change to the islands, giving residents a profound appreciation for civil liberties.[116] About the same time, alongside the urbanization of Hawaii's economy and the rise of a new middle class, the children of immigrant plantation workers of Asian ancestry "were coming to adulthood," creating a huge new block of socially progressive voters.[117] Hawaii residents of Japanese ancestry returned from World War II service in Europe as highly decorated veterans, painfully aware of the internment of over 100,000 Japanese Americans on the mainland,[118] and with a newfound commitment to achieving political leadership and social justice.[119] The election of 1954 ushered in Hawaii's "so-called Democratic revolution,"[120] setting the stage for a new "generation of Democratic politics"[121] and

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[111] *See* Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 903 P.2d 1246, 1263-68 (Haw. 1995) (describing history of Hawaii law).

[112] In the Hawaiian language, *haole* means "foreigner," PUKUI & ELBERT, *supra* note 102, at 21, but, in common usage, usually refers to Caucasians.

[113] GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII: THE DEMOCRATIC YEARS 2 (1990).

[114] *Id.* at 3.

[115] Jose Julian Alvarez-Gonzalez, *Law Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 LAW & INEQ. 359, 427, n.346 (1999).

[116] COOPER & DAWS, *supra* note 113, at 4.

[117] *Id.* at 4, 5-6.

[118] Eric Yamamoto et al., *American Racial Justice on Trial – Again: African American Reparations, Human Rights, and the War on* Terror, 101 MICH. L. REV. 1269, 1274 (2003) (discussing the 1944 Supreme Court *Korematsu* decision, which upheld "the constitutionality of the race-based internment of 120,000 innocent persons of Japanese ancestry on the West Coast during World War II").

[119] COOPER & DAWS, *supra* note 113, at 4 ("many of Hawaii's young *nisei* (the first generation of Japanese ancestry born in the United States, thus American citizens) fought with great distinction in Europe, simultaneously dispelling the myth of the *haoles*' local omnipotence and infusing the Islands' large Japanese community with tremendous pride and a determination to achieve a place in the political and economic sun.").

[120] *Id.* at 5.

[121] *Id.* at 1("beginning in the mid-1950s, the Democrats took political power in what became an overwhelmingly Democratic state").

initiating the substantial social change that has dramatically shaped the state's legal system until the present day. Hawaii's court system took its modern shape in the late 1950s, when serious, cohesive efforts to streamline and modernize island courts began, culminating in major reform in 1959, the year of statehood, when Hawaii's State Constitution was also adopted.[122]

Even judging by national standards, Hawaii's Democrats were "very liberal, and they came into office promising broad reform," including the promotion of civil liberties.[123] For example, Hawaii developed a workers compensation program that led the nation in payout rates; was the first state to adopt mandatory pre-paid health care for workers (1974); was among the first states to abolish the death penalty (1957); was the first state to legalize abortion (1970); and became the first state in the nation to ratify the proposed Equal Rights Amendment to the U.S. Constitution (1972).[124] This historical, social, and political backdrop provided a strong foundation for the distinctive brand of judicial liberalism that came to characterize Hawaii's courts and legislature, and these influences created an equally liberal tort law tradition in Hawaii.

B. Modern Tort Law in Hawaii: A Liberal Tradition

Beginning in the 1960s and 1970s, when the American legal system was undergoing significant change throughout the country, Hawaii set into place many of the building blocks for its progressive social justice and tort law system, generally favoring the rights of victims and expanding the liabilities of defendants. In the late 1970s and early 1980s, two competing dramas began to unfold that would form the major components of Hawaii's modern tort law system. On the one hand, the Hawaii courts consistently, though with a few important exceptions, became the source of liberal (*i.e.* pro-plaintiffs' rights) rulings that expanded tort liability and increased judicial access for tort victims, including in the area of punitive damages. On the other hand, businesses and the insurance industry exerted consistent (although not very effective) counter-pressure on the State Legislature to enact tort reform measures aimed at reducing and controlling tort litigation. On balance, the legislative tort reforms successfully pushed by conservative interests turned out to be quite mild compared to reforms in other states and have, in a general sense, been counterbalanced, even substantially outweighed, by a steady stream of expansive case law from the Hawaii courts.

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[122] *Id.*
[123] *Id.* at 5.
[124] *Id.*

Viewed in context, the Hawaii Supreme Court, rather than the State Legislature, "has been the major player in tort rights and reform in Hawaii."[125] Studies of the Hawaii Supreme Court,[126] including University of Hawaii Law Professor Richard S. Miller's extensive 1992 analysis,[127] concluded that the court, particularly under the leadership of Chief Justice William S. Richardson (1966–1982), revolutionized tort law in a manner similar to (and sometimes ahead of) the major liberalizing decisions of the California courts starting in the 1960s.[128]

Writing in 1992, Miller thought that under the leadership of Richardson's successor, Chief Justice Herman T. Lum (1983–1993), Hawaii's "pro-plaintiff tort revolution" had "all but come to an end."[129] As indicated in this Part, however, the Court's tort jurisprudence under Lum's successor, Chief Justice Ronald Moon (1993–present), does not indicate a pronounced rollback and, in some areas, suggests instead a return to the more liberal tort law regime of Chief Justice Richardson.

When woven together, the Court's decisions in a number of important areas during the modern tort era present a tapestry of jurisprudence that is, reflecting Hawaii's unique culture and history, aimed at protecting the "little guy."[130] A brief survey of major tort law doctrines in Hawaii that affect personal injury litigation provides a more detailed context for these characterizations.[131] It also suggest that Hawaii plaintiffs may have more

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[125] Richard S. Miller & Geoffrey K.S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. REV 55, 116 (1992).

[126] *See, e.g.*, Paul S. Ferber, *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Felt Necessities of the Time,"* 8 HAW. B.J. 77 (1971).

[127] Miller & Komeya, *supra* note 125.

[128] *Id.* at 59-60. As Professor Miller observed:

> "It would not have been a surprise to anyone following the recent political history of Hawaii that the Richardson Court would adopt a most liberal and activist posture in its decisions. Following years of domination by the 'Big Five' and conservative business interests, Hawaii's governmental structure shifted into the hands of the liberal Democrats and their supporters, mostly Hawaii's working people and those who had come from a plantation background, with the election of Governor John Burns in 1962. . . . William S. Richardson, who served as Lieutenant Governor under John Burns, was appointed Chief Justice of the Supreme Court. The Supreme Court was thus put in the hands of a Chief Justice who was committed to serve the common people. Tort decisions following the most liberal trends . . . ought not to have been unexpected."

Id. at 61-62.

[129] *Id.* at 66.

[130] A major exception to the court's broad interpretation of plaintiffs' torts rights are certain decisions during the Lum years, generally in the area of state tort immunity, where the court has tended to take a conservative view and been rather protective of the State's coffers. *See infra* notes 204-207, and accompanying text.

[131] In areas of tort law other than personal injury cases, the court has been similarly pro-plaintiff. For example, on the fundamental issue of who can sue for a public nuisance, the Hawaii Supreme Court stands

opportunities than they might in other jurisdictions to bring and succeed on personal injury lawsuits, providing a richer-than-usual context for generating punitive damages awards.

1. Duty and Causation

The Hawaii courts have long expressed a broad conception of the key negligence concepts of duty and causation. As to duty, "Hawaii has recognized that new duties constantly arise in light of changing social circumstances."[132] For decades, Hawaii has allowed tort suits between children and parents.[133] More recently, the Hawaii Supreme Court in the 1996 *Touchette* decision, a domestic arson-murder case with horrendous facts, endorsed a novel expansion of tort liability.[134]

The Hawaii courts have also taken a liberal view of causation. In the 1961 case *Mitchell v. Branch*, the Hawaii Supreme Court adopted the Restatement's flexible substantial factor test, replacing the traditional test of proximate cause.[135] In 1985, the Intermediate Court of Appeals pushed the substantial factor test to new limits in *Leary v. Poole*.[136] In *Leary*, the court rejected the defendant's superseding cause arguments and allowed a plaintiff to proceed on a negligence theory against the defendant driver who had, eight weeks before plaintiff's highway accident, skidded into and caused the removal of a guardrail, the absence of which contributed to the plaintiff's subsequent injuries at the exact same location on a steep Oahu highway.[137] The jury-centric substantial factor test is firmly entrenched in Hawaii case law.[138]

Similarly, Hawaii remains at the cutting edge in the area of market share liability law. In *Smith v. Cutter Biological Inc.*,[139] the Hawaii Supreme Court held that market share liability applied to HIV-positive Factor VIII blood

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alone at the liberal edge of the public nuisance law landscape. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755, 763 (2001).

[132] Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1538 (1997).

[133] Tamashiro v. De Gama, 450 P.2d 998 (Haw. 1969) (holding that the doctrine that prohibits suits by parents against their children does not obtain in Hawaii); Petersen *ex rel.* Petersen v. City & County of Honolulu, 462 P.2d 1007 (Haw. 1969) (holding that minor children may sue their parents for negligence in Hawaii).

[134] Touchette v. Ganal, 922 P.2d 347 (Haw. 1996).

[135] Mitchell v. Branch, 363 P.2d 969, 973 (Haw. Ct. App. 1961).

[136] 705 P.2d 62 (Haw. Ct. App. 1985).

[137] *Id.* at 64-65, 66-67.

[138] *See* Doe Parents No. 1 v. State Dep't Educ., 58 P. 3d 545, 596 (Haw. 2002); Taylor-Rice v. State of Hawaii, 979 P. 2d 1086, 1011 (Haw. 1999) (discussing the Court's longstanding adoption of the substantial factor test, calling it "a realistic approach to the problems of causation").

[139] 823 P.2d 717 (Haw. 1991).

product that had infected a hemophiliac with the AIDS virus. Adopting the doctrine's "broadest version,"[140] the Court candidly stated: "The problem calls for adopting new rules of causation, for otherwise innocent plaintiffs would be left without a remedy."[141] One commentator called *Smith* "an enormous expansion in the law of actual causation."[142]

2. Contributory and Comparative Negligence

The Hawaii courts have long had a similarly liberal view of contributory and comparative negligence. In 1965, the Hawaii Supreme Court reduced the arsenal of defenses in negligence actions when it decided *Bulatao v. Kauai Motors, Inc.*,[143] joining the "path-breaking decision"[144] of the New Jersey Supreme Court in *Meistrich v. Casino Arena Attractions, Inc.*,[145] and merging secondary assumption of the risk with contributory negligence.[146] Since the adoption of Hawaii's modified comparative negligence statute in 1969,[147] the Hawaiian courts have interpreted it in favor of plaintiffs, including a 1996 decision in which the Intermediate Court of Appeals directed that juries be allowed to consider the consequences of finding a plaintiff's liability above the statute's 50% threshold.[148] The Court has also since eroded the viability of primary implied assumption of the risk as a defense.[149]

3. Medical Consent

In 1970, two years before the landmark D.C. Circuit Court of Appeals decision *Canterbury v. Spence*,[150] the Hawaii Supreme Court adopted a common-law duty of full disclosure by physicians of the risks of medical

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[140] Andrew Klein, *Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation*, 68 TUL. L. REV. 883, 910 (1994).

[141] *Smith*, 823 P.2d 717, at 719.

[142] Klein, *supra* note 140, at 912.

[143] Bulatao v. Kauai Motors, Inc., 406 P.2d 887 (Haw. 1965).

[144] Miller & Komeya, *supra* note 125, at 91.

[145] Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90 (N.J. 1959).

[146] As a result, defendants in Hawaii are not allowed to argue what some call secondary or "unreasonable assumption of the risk," and must be content with the two remaining defenses of primary (reasonable) assumption of the risk and contributory (now comparative) negligence based on the unreasonableness of the plaintiff's conduct. For a discussion of Hawaii's complex assumption of the risk doctrine, see Larsen v. Pacesetter Systems, Inc., 837 P.2d 1273, 1290-92 (Haw. 1992).

[147] HAW. REV. ST. § 663-31 (2002). *See generally* Article, *A Proposal for the Judicial Adoption of Comparative Negligence in Hawaii*, 5 HAW. B.J. 49 (1968).

[148] Rapoza v. Parnell, 924 P.2d 572, 580 (Haw. Ct. App. 1996).

[149] *See* Larsen v. Pacesetter, 837 P.2d 1273 (Haw. 1992) ("we join those courts that have abolished primary implied assumption of risk in strict products liability"); *but see* Foronda *ex rel.* Est. of Foronda v. Hawaii Int'l Boxing Club, 25 P.3d 826, 836 (Haw. 2001) (preserving primary implied assumption of the risk in sports injury cases).

[150] Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

treatment in *Nishi v. Hartwell.*[151] Although the standard of disclosure adopted by the Court was the more conservative "physician-oriented" test, the case was a landmark in medical consent law.[152] In 1995, the Court overruled this conservative aspect of *Nishi* in *Carr v. Strode,*[153] and adopted the more plaintiff-friendly "patient-oriented" standard of care for a physician's duty to disclose risk information prior to treatment.[154]

4. Products Liability Law

In 1970, Hawaii joined the national pro-plaintiff products liability "bandwagon" in *Stewart v. Budget Rent-A-Car,*[155] adopting Section 402A of the American Law Institute's *Restatement of Torts 2d,* a strict liability approach to product defects.[156] As Harvey Henderson noted, "[f]ollowing *Stewart,* plaintiffs in Hawaii had three alternative theories of liability: common law negligence, implied warranty and strict liability in tort. For a small state, Hawaii has developed a fairly significant body of case law since the *Stewart* decision."[157] The Hawaii Supreme Court has continued to expand its products liability jurisprudence[158] with "unmitigated pro-claimant cases and holdings."[159] The Court later adopted pure comparative negligence for products cases,[160] expanding the remedies available to, and the bargaining

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[151] Nishi v. Hartwell, 473 P.2d 116, 119 (Haw. 1970).

[152] *See* George Bussey, Case Note, Keomaka v. Zakaib*: The Physician's Affirmative Duty To Protect Patient Autonomy Through the Process of Informed Consent*, 14 U. HAW. L. REV. 801, 809-12 (1992).

[153] Carr v. Strode, 904 P.2d 489 (Haw. 1995).

[154] O'Neal v. Hammer, 953 P.2d 561, 565 (Haw. 1998) ("we expressly adopted the 'patient-oriented' standard applicable to a physician's duty to disclose risk information prior to treatment").

[155] 470 P.2d 240 (Haw. 1970); *see* Miller & Komeya, *supra* note 125, at 59 (calling *Stewart* one of "the principal decisions which epitomized the tort revolution in Hawaii").

[156] *See Stewart*, 470 P.2d at 243 (expressly adopting a strict liability approach, embracing the doctrine in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962), *id.*, and importing "essentially the rule adopted in Restatement of Torts, 2d, 402A," *id.* at n.3). *See also* Harvey E. Henderson, Jr., *Recurring Issues in Hawaii Products Liability*, 1996 Jan. HAW. B.J. 6.

[157] Henderson, *supra* note 156, at 6.

[158] Hawaii is one of only six states to have adopted the consumer expectations test as an independent test for design defect cases, a position that now runs contrary to the *Restatement (Third) of Torts. Restatement (Third) of Torts: Products Liability,* § 2 cmt. d, reporter's note (1998).

[159] Miller & Komeya, *supra* note 125, at 110. *See also id.* at 107-12 (noting that the Lum court has "continued without significant hesitation to follow the pro-claimant trend of its predecessor," *id.* at 107). The exception, noted by Miller & Komeya, *id.* at 111-12, is in a handful of cases involving hotel and apartment defendants for installed products, where the Court seems to be concerned about local economic implications of expansive liability. *See* Bidar v. Amfac, Inc., 669 P.2d 154 (Haw. 1984) (towel rack collapsed under weight of guest using bathroom); Armstrong v. Cione, 738 P.2d 79 (Haw. 1987) (injury from cracked shatter-proof shower door in apartment).

[160] Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Haw. 1982); *Armstrong,* 738 P.2d 79 (rejecting application of comparative negligence to products liability); Hao v. Owens-Illinois, 738 P.2d 416 (Haw. 1987) (finding that a plaintiff with 51% fault attributed to his smoking could still recover against a 2% fault defendant); *see also* Torres v. Northwest Eng'g Co., 949 P.2d 1004 (Haw. Ct. App. 1997) (finding that pure

power of, plaintiffs.[161]

Some commentators believe that, although unexpressed, the reason for this liberal products liability jurisprudence is "home court advantage," *i.e.* the fact that the impacts of products liability tend to "land on manufacturers located outside Hawaii," while the benefits inure to local victims, presenting "relatively little or immediate direct impact on local enterprises or local insurance rates."[162]

5. Joint and Several Liability

In the area of joint and several liability, the Hawaii Supreme Court has struggled to balance conflicting tort policies. In May 1986, the Hawaii Supreme Court reversed the jury verdict in *Kaeo v. Davis,*[163] a case that nonetheless quickly became a nationally notorious joint and several liability story.[164] In *Kaeo*, the trial court found a 1% at-fault municipal defendant jointly and severally liable with a 99% at-fault drunk driver for a $725,000 damages award.[165] Despite the Supreme Court's reversal,[166] the trial court's verdict left a reverberating impression that Hawaii juries and courts were distinctly pro-plaintiff.[167] A few months later, the legislature held a historic special session to adopt a package of tort reform bills that on their face (though not in fact) "abolished" joint and several liability in Hawaii.[168]

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comparative negligence principles apply to plaintiff's recovery in strict products liability cases).

[161] *See* Lisa M. Ginoza & Curtis G.K. Yuen, Note, Armstrong v. Cione *and* Hao v. Owens – Illinois: *Applying Pure Comparative Negligence Principles to Strict Products Liability Actions*, 10 U. HAW. L. REV. 393 (1988). In *Masaki v. General Motors Corp.*., 780 P.2d 566 (Haw. 1989), the Hawaii Supreme Court held that the plaintiff needed to prove only that the defendant's design was the legal cause of injury, then the burden of proof would shift to the defendant to prove that the benefits of the design outweigh the risk of danger inherent in the design. *Id.* at 579. The Court also rejected the defendant's argument that it must be allowed to offer evidence as to the feasibility and beneficial effect of including a warning, and allowed the plaintiff to present evidence of a proposed alternative design. *Id.* at 580. *See* discussion of *Masaki* in John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects – A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 631 (1996).

[162] Miller & Komeya, *supra* note 125, at 115.

[163] Kaeo v. Davis, 719 P.2d 387 (Haw. 1986).

[164] *See* Mark M. Hager, *What's (Not!) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 CONN. L. REV. 77, 104 (2000) (discussing *Kaeo* first among a list of alleged "poster-child case[s] of purported injustice under joint and several liability").

[165] *Kaeo*, 719 P.2d at 390.

[166] The Supreme Court held that the trial court should have informed the jury (as the City had requested) about the application of Hawaii's joint and several liability law, so that the jury could have understood the severe implications of its decision on the defendants' ultimate liability. Kaeo, 719 P.2d at 451. *See* Jeffrey D. Watts, Note, *Kaeo v. Davis: Informing Juries of the Effects of Their Special Verdicts Under the Law of Joint and Several Liability*, 9 U. HAW. L. REV. 275 (1987).

[167] Hager, *supra* note 164, at 104.

[168] John Y. Gotanda, *Joint and Several Liability in Hawaii: An Analysis of Proposed Changes*, 21 HAW. B.J. 175 (1988). This move by the legislature is discussed at greater length in Part III.

More recently, in 1998, the Hawaii Supreme Court again checked a lower court's more liberal view of joint and several liability. In *Ozaki v. Association of Apartment Owners of Discovery Bay*, [169] the Hawaii Intermediate Court of Appeals held that a condominium association could be held jointly and severally liable with a trespassing murderer for a tenant's death, even though the condominium association's liability was based on negligence only. Two months later, however, the Hawaii Supreme Court quickly and forcefully reversed, relieving the condominium association of all liability under Hawaii's comparative negligence statute and mooting the application of the joint and several liability statute.[170] Legislative intent behind the 1986 tort reform laws[171] and the far-reaching business implications of the Intermediate Court of Appeals' decisions apparently heavily influenced the Hawaii Supreme Court's rapid reversal.[172] This handful of conservative judicial decisions, however, just nibbles at the edges of Hawaii's otherwise quite liberal statutory structure for joint and several liability, which is discussed at greater length in Part III below.

6. Negligent Infliction of Emotional Distress

In 1970, Hawaii sparked a national judicial trend by abolishing the physical injury rule in negligent infliction of emotional distress ("NIED") cases, allowing the claim as an independent cause of action.[173] Hawaii courts recognized NIED claims even based on injury to property alone. In *Rodrigues v. State of Hawaii*,[174] distressed owners of a Maui home that flooded as a result of the State's negligent failure to clear a plugged culvert were allowed to recover, even though they had not yet moved in, incurred

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[169] Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. Ct. App. 1998).

[170] Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 954 P.2d 644 (Haw. 1998) (finding that the 5% negligence-based fault of the victim should have been compared directly to the 3% negligence-based fault of the condominium association).

[171] *Id.* at 648-49.

[172] *See, e.g., id.* at 645 (noting participation of Amicus Curiae Hawaii Insurance Council).

[173] For a thorough discussion of the Hawaii case law, see Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979) [hereinafter Miller, *Emotional Distress*]. *See also* Kenneth W. Miller, Note, *Toxic Torts and Environmental Distress: The Case for an Independent Cause of Action for Fear of Future Harm*, 40 ARIZ. L. REV. 681, 695 (1998) (noting Hawaii began the trend); Ellen L. Luepke, Note, *HIV Misdiagnosis: Negligent Infliction of Emotional Distress and the False-Positive*, 81 IOWA L. REV. 1229, 1236 (1996) ("Hawaii and California led the move toward recognizing emotional distress as an independent tort action."). The Hawaii NIED doctrine has been called "amusing," "unmanageably broad," and "dysfunctional." David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 500-01 (1992).

[174] Rodrigues v. State of Hawaii, 472 P.2d 509 (Haw. 1970).

only property damage, and suffered no physical injury related to the flooding incident. A series of cases followed that put Hawaii in a field of its own in this area of the law,[175] creating a novel and expansive test that seems to still be broadening. Under Hawaii law, plaintiffs may recover even for NIED experienced from post-accident news of the death of a pet,[176] making Hawaii one of only a few jurisdictions in the country to recognize this tort.[177]

Hawaii NIED law continued to be broadly interpreted in subsequent cases like the 1989 *Masaki v. General Motors* case, which allowed recovery by parents who suffered emotional distress upon seeing their adult son in the hospital after a severe accident.[178] The court took another liberal turn in the 1999 case *John and Jane Roes v. FHP, Inc.*,[179] holding that airport baggage handlers who were exposed to, but not ultimately infected by, HIV-tainted blood from a burst package could claim NIED for the period of time during which they had a legitimate fear of AIDS.[180] Without doubt, Hawaii has established itself as the national standardbearer of liberal NIED rulings.

7. Premises Liability

One year after the California Supreme Court's landmark 1968 landowner liability ruling in *Rowland v. Christian*,[181] the Hawaii Supreme Court followed suit, deciding in *Pickard v. City & County of Honolulu*[182] to join California in abandoning the traditional categorical approach to landowner liability and adopting a broad reasonable care standard "for persons reasonably anticipated to be upon the premises."[183]

Premises liability and the general concept of duty were further expanded

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[175] *See generally* Miller, *Emotional Distress, supra* note 173.

[176] Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981) (holding that family members could recover damages for injured feelings and mental distress suffered through loss of dog). Hawaii also recognized that NIED plaintiffs can extend beyond legal relatives in *Leong v. Takasaki*, 520 P.2d 758 (Haw. 1974) (allowing victim's "*hanai*," informally adopted, grandson to recover for witnessing her death in crosswalk).

[177] *See* Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1078-80 (1995). "No jurisdiction, however, has gone as far as Florida and Hawaii have in allowing recovery for emotional damages resulting from the tortious killing of a companion animal." *Id.* The Hawaii Legislature partially limited this type of claim in a 1986 amendment, HAW. REV. STAT. ANN. § 663 - 8.9 (Michie 2002), but still allowed it for cases where physical injury or mental illness could be proven.

[178] Masaki v. General Motors, Inc., 780 P.2d 566 (Haw. 1989), *rec'n denied*, 833 P.2d 899 (Haw. 1989). *See* Linda M. Paul, Note, *Masaki v. General Motors Corp.: Negligent Infliction of Emotional Distress and Loss of Filial Consortium*, 12 U. HAW. L. REV. 215 (1990).

[179] John and Jane Roes v. FHP, Inc., 985 P.2d 661 (Haw. 1999).

[180] *Id.* at 665-66.

[181] Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

[182] Pickard v. City & County of Honolulu, 452 P.2d 445 (Haw. 1969).

[183] *Id.* at 446.

by the Hawaii Supreme Court in later cases. In *Knodle v. Waikiki Gateway Hotel, Inc.*,[184] the Court broadened innkeeper liability by imposing a broad duty on hotels to protect guests from the criminal conduct of third parties.[185] More recently in *Gump v. Wal-Mart Stores, Inc.*,[186] a case where the plaintiff slipped on a McDonald's french fry in a Kona Wal-Mart store, the Hawaii Supreme Court quickly affirmed[187] the Intermediate Court of Appeals' adoption of a liberal "mode of operation" rule for self-service businesses that market goods in a manner that encourages hazardous conditions. Despite a flurry of amici briefs from businesses and insurers, the Court agreed that, under the mode of operation rule, the store need not have had actual or constructive notice of the fallen french fry to be liable.[188]

8. Tort Damages for Breach of Contract

Until recently, the Hawaii Supreme Court also took a "novel approach allowing recovery of emotional damages in breach of contract actions."[189] In *Dold v. Outrigger Hotel*, decided in 1972,[190] the Court allowed emotional distress damages arising from the defendant hotel's policy of consistently over-booking rooms. The Court later broadened this doctrine to include commercial contracts in the 1980 case *Chung v. Kaonohi Center Co.*[191] In 1999, however, the Hawaii Supreme Court abruptly reversed this liberal doctrine and rejoined the "overwhelming majority of states."[192] In *Francis v. Lee Enterprises*, the Court refused to recognize tortious breach of contract as a cause of action in an employment context.[193] This decision was later

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[184] Knodle v. Waikiki Gateway Hotel, Inc., 742 P.2d 377 (Haw. 1987).

[185] *See* Virginia M. Chock & Leslie H. Kondo, Note, Knodle v. Waikiki Gateway Hotel, Inc.: *Imposing a Duty To Protect Against Third Party Criminal Conduct on the Premises*, 11 U. HAW. L. REV. 231, 231 (1989) (noting that *Knodle* expanded premises liability in Hawaii).

[186] Gump v. Wal-Mart Stores, Inc., 5 P.3d 407 (Haw. 2000), *aff'g in part and rev'g in part*, 5 P.3d 418 (Haw. Ct. App. 1999).

[187] The Intermediate Court of Appeals' decision was issued on November 17, 1999, and the Supreme Court's decision was issued on July 27, 2000.

[188] See *Gump*, 5 P.3d. at 408 (noting participation of business, property owner, and insurance amici); *id.* at 410-11.

[189] Comment, Brown v. Fritz: *A Further Restriction on the Recovery of Damages for Emotional Distress Arising From a Breach of Contract*, 14 AM. J. TRIAL ADVOC. 203, 214-15 (1990). *See also* Matt McCall, Casenote, Russ Francis v. Lee Enterprises: *Hawaii Turns Away from Tortious Beach of Contract*, 23 U. HAW. L. REV. 647, 647 (2001) ("In the seventies and early eighties, Hawaii was at the forefront of a national movement attempting to reach beyond the strict confines of traditional contract law – toward better compensating plaintiffs in contract disputes.")

[190] Dold v. Outrigger Hotels, 501 P.2d 368 (Haw. 1972).

[191] Chung v. Kaonohi Center Co., 618 P.2d 283 (Haw. 1980) (allowing emotional distress damages to plaintiffs, who spent substantial funds for a restaurant opening, whose space was then leased to another tenant).

[192] McCall, *supra* note 189, at 647.

[193] Francis v. Lee, 971 P.2d 707 (Haw. 1999); McCall, *supra* note 189, at 647.

codified by the Hawaii Legislature.[194]

9. Employment Torts Law

Generally, the Hawaii Supreme Court has "a tradition of interpreting Hawaii's worker compensation statutes liberally" and has taken a "pro-employee course."[195] In a 1982 case that gained national prominence, *Parnar v. Americana Hotels, Inc.*,[196] the Court held that an employer may be held liable in tort for discharging an at-will employee in violation of a clear mandate of public policy.[197] This kind of wrongful discharge claim was deemed tort-like because of the broad range of remedies, such as lost wages, emotional distress, and punitive damages.[198]

10. Dram Shop and Social Host Liability

Initially, the Hawaii Supreme Court took an expansive view of dram shop and social host liability for the accidents caused by inebriated customers and guests, but the development of the doctrine in this area has been volatile. In 1980, in *Ono v. Applegate,*[199] the Court "broke with a long tradition and held that a bar could be held liable to an accident victim of a bar patron who was negligently served liquor, in violation of a statute, while intoxicated," thus "join[ing] the mainland's progressive trend of extending the negligence principle."[200] After *Ono*, however, the Court under Chief Justice Lum adopted a more limited view of dram shop liability, "put[ting] an end to the logical extension of the negligence principles set free in *Ono*."[201] In 1990, in *Johnston v. KFC National Management Co.*,[202] the Court declined to extend

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[194] HAW. REV. ST. § 663-1.2 (2002).

[195] William Shultz, Mitchell v. State *and HRS § 386-3: Workers' Compensation Reform in the State of Hawaii*, 21 U. HAW. L. REV. 807, 817 (1999).

[196] Parner v. Americana Hotels, Inc., 652 P.2d 625 (Haw. 1982). *See* Brock Rowalt, Comment, *The Public Exception to Employment At Will: Can Judicial Decisions Be Used As A Source of Public Policy?*, 62 U.M.K.C. L. Rev. 325, 340 (1993) (noting that, despite criticism that the approach subjects employers to unpredictable tort damages, many courts have followed *Parnar*).

[197] For a detailed discussion of this case, see Deborah S. Jackson & Elizabeth J. Fujiwara, *Employee Rights Under Judicial Scrutiny: Prevalent Policy Discourse and the Hawaii Supreme Court*, 14 U. HAW. L. REV. 189 (1992).

[198] *See* Lisa A. Chun, Comment, United States v. Burke *and Internal Revenue Code Section 104(a)(2): When Will Personal Injury Damages Be Taxed?*, 16 U. HAW. L. REV. 263, 293-94 (1994).

[199] Ono v. Applegate, 612 P.2d 533 (Haw. 1980).

[200] Miller & Komeya, *supra* note 125, at 61. *See also*, Note, Ono v. Applegate*: Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149 (1981).

[201] Miller & Komeya, *supra* note 125, at 96 (suggesting the Court showed a new appreciation for defendants' arguments about economic impact and the legislature's intent behind tort reform). *See also* George B. Apler, Note, Bertelmann v. Taas Associates*: Limits on Dram Shop Liability; Barring Recovery of Bar Patrons, Their Estates and Survivors*, 11 U. HAW. L. REV. 277 (1989).

[202] Johnston v. KFC National Management Co., 788 P.2d 159 (Haw. 1990).

Ono to non-commercial suppliers of alcoholic beverages, *i.e.* the social host. Yet, in 1994, dram shop liability expanded again in *Reyes v. Kuboyama.*[203]

11. Governmental Immunity and Liability

Despite its otherwise pro-plaintiff jurisprudence, the Hawaii Supreme Court has demonstrated a reluctance to impose broad liability on government, narrowly interpreting the State Tort Liability Act.[204] Although the court seemed to reverse direction in a 1999 case that expanded state highway liability to cover negligent drivers,[205] the decision sparked a strong legislative reaction.[206] With respect to punitive damages, however, the State government has long been immune by statute.[207]

12. Bad Faith Insurance

In 1996, the Hawaii Supreme Court made Hawaii the 47th state to recognize the tort of bad faith insurance, opening up new horizons for litigation and punitive damages.[208] Although some commentators had earlier predicted that the tort opened up a "bad faith-punitive damages lottery,"[209] others suggested that the predictions of an "explosion" in litigation, at least in Hawaii, were unlikely.[210]

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[203] Reyes v. Kuboyama, 870 P.2d 1281 (Haw. 1994) (holding "Hawaii's liquor control statute imposes a duty to innocent third parties upon liquor licensee to refrain from selling alcohol to a minor, and that duty may be breached even if the intoxicated minor who causes an injury is not the minor who actually purchased the liquor"). *See* Mark L. Weber, Note, *Reyes v. Kuboyama: Vendor Liability for Sale of Intoxicating Liquor to Minors Under a Common Law Negligence Theory*, 17 U. HAW. L. REV. 355, 355-56 (1995).

[204] *See, e.g.*, Figueroa *ex rel.* Figueroa v. State, 604 P.2d 1198 (Haw. 1979) (holding State not liable for damages in civil rights suits); Wolsk v. State of Hawaii, 711 P.2d 1300 (Haw. 1986) (finding State immune from lawsuit by injured campers); *see generally* Randall L.K.M. Rosenberg, Note, *Wolsk v. State: A Limitation of Governmental Premises Liability*, 9 U. HAW. L. REV. 301 (1987). *See also* discussion of municipal liability in *Kaeo*, *supra* note 163. *But see* Tseu ex rel. Hobbs v. Jeyte, 962 P.2d 344 (Haw. 1998) (holding that State Civil Rights Commission could be liable for negligent investigation of a housing complaint).

[205] Taylor-Rice v. State, 979 P.2d 1086 (Haw. 1999) (overruling Ikene v. Mauro, 511 P.2d 1087 (Haw. 1973)).

[206] *See* "A Bill for an Act Relating to Litigation Highways [sic]," H.B. No. 519, Stand. Com. Rep. No. 81, 21st Sess. Leg. (2001) (reacting to *Taylor-Rice* by proposing limits on state liability of certain careless drivers).

[207] HAW. REV. STAT. § 662-2 (2003) ("The State . . . shall not be liable for . . . punitive damages.") (The State Tort Liability Act was originally enacted in 1957.)

[208] Best Place, Inc. v. Penn America Insurance Co., 920 P.2d 334 (Haw. 1996). For an excellent discussion of the implications of *Best Place*, see Lane C. Boyarski, *The Best Place, Inc. v. Penn American Insurance Company: Hawaii Bad Faith Cause of Action for Insurer Misconduct*, 19 U. HAW. L. REV. 845, 875 (1997).

[209] Boyarski, *supra* note 208, at 847, n.272 (citing Douglas Houser, *Good Faith As A Matter of Law: The Insurance Company's Right to be Wrong*, 27 TORT & INS. L.J. 665, 666 (1992)).

[210] Boyarski, *supra* note 208, at 875.

13. Survival and Wrongful Death

The tort of wrongful death was adopted as part of the common law of Hawaii in 1860,[211] long before the doctrine was codified by the State Legislature.[212] Since codification, the courts have broadly interpreted both the survival[213] and wrongful death statutes, including a 1994 decision that allowed two separate families of a deceased victim to recover for wrongful death damages.[214]

In summary, with few exceptions, Hawaii has a distinctly liberal torts jurisprudence, opening the courthouse doors widely to plaintiffs' personal injury litigation. Hawaii's legal and tort law history provide a very rich "growth medium" for punitive damages awards. As discussed in the next Part, Hawaii's punitive damages jurisprudence also is quite liberal and should foster high frequency and amounts of awards. Despite this supportive context, however, the quantitative data discussed below do not indicate an explosion in awards, suggesting that Hawaii's liberal jurisprudential context and punitive damages jurisprudence must be tempered by other influences that also affect the award of punitive damages.

II. THE DOCTRINAL CONTEXT: HAWAII'S PUNITIVE DAMAGES JURISPRUDENCE

To build the second foundational layer of an integrated examination of punitive damages in Hawaii, and to provide a judicial context for any potential legislative reform, this Part analyzes the major features of Hawaii's punitive damages jurisprudence. This evaluation concludes that, on the whole, this doctrinal landscape is quite liberal, like the broader contours of general tort law discussed in above in Part I. Hawaii punitive damages case law favors the injured plaintiff and is favorable to punitive damages awards.

Approximately 200 reported appellate cases in Hawaii discuss punitive damages in some way, but only about twenty of these cases provide substantive guidance on the contours of punitive damages doctrine. This

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[211] Kake v. C.S. Horton, 2 Haw. 209 (1860).

[212] HAW. REV. STAT. § 663-3 (2003).

[213] *See, e.g.*, Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. Ct. App. 1998), *aff'd in part and rev'd in part on other grounds*, 954 P.2d 644 (Haw. 1998) (allowing loss of enjoyment of life under a survival action).

[214] *See* Lealaimatafao v. Woodward-Clyde Consultants, 867 P.2d 220 (Haw. 1994) (allowing both "legal" family and second "common law" family of victim of electrocution accident to claim under wrongful death statute).

analysis focuses on punitive damages case law arising from personal injury cases in state court,[215] although awards also arise from other tort contexts, such as defamation, injury to property, and trespass.[216] Hawaii case law broadly interprets the purpose of punitive damages to include not only deterrence and punishment, but also compensation and attorneys fees (see Part II A below). Since 1911, Hawaii has had a broad amalgamated standard for determining when punitive damages may be awarded, including malice, willful indifference, wanton or oppressive acts, criminal indifference to civil obligations, and an "entire want of care" that "raises the presumption of a conscious indifference to consequences," affording juries broad discretion (Part II B). This flexible standard has supported awards in a wide variety of factual contexts, and the Hawaii Supreme Court had stated that awards are appropriate in products liability cases (Part II C). In the 1989 *Masaki* decision, the Hawaii Supreme Court adopted the "clear and convincing"

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[215] For Hawaii cases involving federal statutory law on punitive damages, *see, e.g.*, Flowers v. First Hawaiian Bank, 295 F. Supp. 2d 1130, 1137-38 (D. Haw. 2003) (denying punitive damages under federal statutory standard in soldier's claim against bank and credit union under the Right to Financial Privacy Act); Pachuta v. Unumprovident Corp., 242 F. Supp. 2d 742, 764 (D. Haw. 2003) (finding punitive damages not available under ERISA); Patricia M. v. Lemahiue, 141 F. Supp. 2d 1243, 1252-53 (D. Haw. 2001) (allowing claim of punitive damages for mistreatment of special education child under Federal Rehabilitation Act); Lesane v. Hawaiian Airlines, 75 F. Supp. 2d 1113, 1127 (D. Haw. 1999) (recognizing availability of punitive damages under Title VII). Otherwise, recent federal court cases in Hawaii have, of course, closely followed Hawaii state law on punitive damages. *See, e.g.*, Pacific Employers Ins. Co. v. Servco Pac. Inc., 273 F. Supp. 2d 1149, 1158-59 (D. Haw. 2003) (allowing punitive damages claim for bad faith to proceed under *Best Place* doctrine); Daly v. Harris, 215 F. Supp. 2d 1098, 1124-25 (D. Haw. 2003) (applying Hawaii decisional law that bars punitive damages against a municipality); Miracle v. New Yorker Mag., 190 F. Supp. 2d 1192, 1203 (D. Haw. 2003) (applying *Masaki* standard to punitive damages claim of self-proclaimed lost daughter of Marilyn Monroe); Bynum v. Magno, 125 F. Supp. 2d 1249, 1257 (D. Haw. 2000) (applying *Masaki* clear and convincing standard); Matsuda v. Wada, 101 F. Supp. 2d 1315, 1325 (D. Haw. 1999) (applying Hawaii law); Allen v. Iranon, 99 F. Supp. 2d 1216, 1240-41 (D. Haw. 1999) (applying Hawaii law); Kahale v. ADT Auto. Services, 2 F. Supp. 2d 1295, 1302-03 (D. Haw. 1998) (denying punitive damages for employment discrimination based on Hawaii standard); and Tran v. State Farm Mut. Auto Ins. Co., 999 F. Supp. 1369, 1377 (D. Haw. 1998) (denying plaintiffs claim for punitive damages from insurance company for mishandling of claim, relying on *Masaki* clear and convincing standard).

[216] In one early defamation case, *Kahanamoku v. Advertiser Publ'g Co.*, 26 Haw. 500 (1922), the Territorial Supreme Court upheld a trial court award of compensatory damages that it assumed also included exemplary damages. The case is of historical interest because it involved a lawsuit by one of Hawaii's most famous sons, the champion surfer and swimmer Duke Kahanamoku, a Native Hawaiian, against the Honolulu newspaper for calling him a "slacker" when he had failed to enter a swimming meet. *Id.* at 506-507. The Supreme Court affirmed the verdict, even though it rejected Kahanamoku's argument on appeal that the jury should have been instructed that the term "slacker" implied he had evaded military duty, a libelous accusation coming one year after the armistice in World War I. *Id.* For discussion of punitive damages in the context of an early trespass case, see *Chin Kee v. Kaeleku Sugar Co.*, 29 Haw. 524 (1926) (finding insufficient evidence of "special misconduct and aggravation" in case where defendant's crew had harvested sugar cane from three acres of plaintiff's land in Hana, Maui and reaffirming that principals are not liable for punitive damages from the conduct of their employees absent participation in the act, expressly or by implication).

standard of proof, raising it from the preponderance of the evidence standard that had previously been in force (Part II D). The standard for appellate review is the highly deferential "abuse of discretion" standard, and appellate courts loosely review the amount of awards under an "excessiveness" standard (Part II E). In Hawaii, the defendant's wealth is a legitimate factor the jury may consider in setting the amount of the award (Part II F). Finally, Hawaii courts take the position that punitive damages can be awarded even when no compensatory award is made (Part II G). Woven together, these doctrinal strands indicate a fertile jurisprudential ground for punitive damages awards in Hawaii.

A. The Purpose of Punitive Damages

Like other states, Hawaii recognizes that the fundamental purpose of awarding punitive damages is to "punish the wrongdoer and to deter him and others from committing similar wrongs and offenses in the future."[217] Yet, Hawaii also implicitly recognizes broader purposes. In a footnote in *Masaki*, the Hawaii Supreme Court recognized other goals, including preserving the peace, inducing private law enforcement, compensating victims, and paying plaintiff's attorneys fees.[218] In 1996, the Hawaii Intermediate Court of Appeals endorsed this dicta from *Masaki*, explicitly allowing consideration of plaintiff's attorneys fees as a factor in setting the amount of a punitive damages award.[219] The Hawaii Supreme Court affirmed this broad approach one year later in *Lee v. Aiu*,[220] a real property title dispute, holding that "facilitating payment of a plaintiff's attorney's fees is one of the purposes of punitive damages."[221] This broad approach tends to favor the full

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[217] Iddings v. Mee-Lee, 919 P.2d 263, 270 (Haw. 1996) (citing *Masaki*, 780 P.2d at 575).

[218] Masaki, 780 P.2d at 571 n.2 (citing Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982)).

[219] Kunewa v. Joshua, 924 P.2d 559, 568-72 (Haw. App. 1996) (upholding trial court instructions that allowed jury to consider plaintiff's attorneys fees in setting award of $95,000 in punitive damages but remanding award for other evidentiary errors); Romero v. Hariri, 911 P.2d 85, 94-95 (Haw. App. 1996) (upholding trial court's denial of attorneys fees where plaintiff was awarded $1 million in punitive damages that already factored in, under *Masaki*, attorneys fees as a legitimate purpose of a punitive damages award). In *Kunewa*, the court claimed it was joining the "majority of jurisdictions," *id.* at 568, but a review of other states' doctrine indicates that Hawaii appears to be one of only eleven jurisdictions that expressly allow the plaintiff's attorneys fees to be calculated into the punitive award. This conclusion is based on a comparison of Hawaii punitive damages doctrine to other states conducted by the author and Research Assistant Jamie Tanabe in 2002, using RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE (1991), as a foundation and then updating the information for each individual state [hereinafter *States PD Doctrine Survey*, on file with author].

[220] Lee v. Aiu, 936 P.2d 655 (Haw. 1997).

[221] *Id.* at 671 (affirming in principle the punitive damages award, but vacating and remanding for new trial to allow Lee to introduce, "as an element of punitive damages, evidence of those attorney's fees she incurred in litigation with the Dixons").

compensation of plaintiffs, but also may be subject to new constitutional challenges by defendants.[222]

B. Conduct Required for Award of Punitive Damages

Hawaii allows punitive damages awards for a very wide range of conduct, making it one of the more liberal states on this issue. Of the forty-six states permitting punitive awards, the nature of the conduct justifying these awards falls roughly into four primary categories: 1) proof of malice required (twelve states); 2) punitive damages allowed for conduct more culpable than gross negligence but without proof of malice (twenty-five states); 3) punitive awards for gross negligence allowed (seven states); and 4) statutory provisions authorizing punitive damages upon violation of a statute (two states).[223] Hawaii's complex standard is a flexible common law amalgamation of the first three categories. As the Hawaii Supreme Court recently emphasized: "the jury need[] only find *either* willful misconduct *or* entire want of care, to wit, gross negligence, in order to properly award punitive damages."[224]

Hawaii's earliest decision discussing the standard for punitive damages, the 1857 *Coffin v. Spencer* case,[225] involved a barroom assault in the Merchant's Exchange. After the plaintiff made offensive comments to the defendant, who was playing billiards, the defendant "dropped his cue and walked up to the plaintiff in a somewhat menacing manner, putting his hands on each side of the plaintiff's neck, seizing him by the collar," causing plaintiff to injure his knee, faint, and go into shock.[226] The Territorial Supreme Court of Hawaii affirmed the lower court's award of punitive damages, articulating the well-accepted principle that "malicious motives" can warrant punitive damages.[227]

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[222] The *Kunewa* court's dismissal of federal constitutionality concerns about such a broad state standard, 924 P.2d at 569-71, may be out of date in light of the U.S. Supreme Court's recent more conservative decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 409, 424-26 (2003). *See supra* note 28.

[223] States PD Doctrine Survey, *supra* note 219.

[224] Ditto v. McCurdy, 947 P.2d 952, 960 (Haw. 1997).

[225] Coffin v. Spencer, 2 Haw. 23 (1857).

[226] *Id.* at 23-24.

[227] *Id.* at 25-26. The Court's explanation of the circumstances warranting a punitive damages award are still illuminating today: "In aggravated cases, when it appears that the defendant was actuated by malicious motives, as, for instance, when a violent assault and battery has been committed without any apparent provocation, or upon slight and inadequate provocation; when the defendant has used dangerous weapons; or when he has accompanied the act with such expressions as displayed a malicious purpose, and not merely a temporary excitement or irritation of passion from provocation, in such cases juries go beyond the rule of a just compensation for the injury sustained by the plaintiff, and very justly too, in my opinion,

About fifty years later, in the 1911 case of *Bright v. Quinn,* the Territorial Supreme Court provided a much broader discussion of the range of conduct that can support punitive damages.[228] In *Bright*, the plaintiff was standing on the running board of an electric street-car running down Hotel Street in downtown Honolulu when he was "thrown to the ground by the impact of the automobile [that] was going in the opposite direction."[229] Plaintiff suffered severe injuries, required surgery, and had over five months of painful recovery, requiring eight days of hospitalization, as well as job loss.[230] In upholding the verdict, the Court emphasized that "the collision was accompanied by a crash which was plainly audible to those on the street-car and that the defendant continued on his way in his automobile without stopping to render assistance or make any inquiries."[231] Although the jury did not specify the exact nature of its $1000 award, the Court found ample support for any punitive component, holding: "In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them."[232] The Court also stated the standard covered a patchwork of conduct and intents: "Such damages may be awarded in cases where the defendant 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations' . . . or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.'"[233]

This multi-prong *Bright* standard, still the dominant test in Hawaii, has many dimensions. Some of the early cases focused on the fraudulent conduct of the defendant[234] but created doctrine that liberally allowed punitive

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award against the defendant what are called vindictive damages, punitive damages, or, as we say, smart money. In such cases they give these extra damages, as a punishment to the plaintiff, and, for the sake of example, to deter others from committing the like offense." *Id.* at 26-27. Although instructed on the law of punitive damages, the jury in *Coffin* did not appear to impose them. The jury awarded the plaintiff $54.20, a little more than the amount of plaintiff's physician's bill. *Id.* Apparently, the jury was persuaded that plaintiff, who had been drinking to excess the two prior nights at Booth's Dancing Saloon and who sparked the confrontation at the billiard hall by making rude and offensive comments to defendant, bore some responsibility for his own injuries. *Id.*

[228] Bright v. Quinn, 20 Haw. 504, 511-12 (1911).

[229] *Id.* at 505.

[230] *Id.* at 511.

[231] *Id.* at 513.

[232] *Id.* at 512.

[233] *Id.*

[234] In 1978, the Court clarified that an award for punitive damages is restricted to an evaluation of the defendant's conduct towards the plaintiff, and not towards the court. Kang v. Harrington, 587 P.2d 285, 291 (Haw. 1978) ("fraud on the court is unrelated to the fraud on appellee and will not provide a basis for an award of punitive damages"); *see also Kunewa,* 924 P.2d at 571-72 (holding that a defendant's violation of the circuit court's order could not support a punitive damages award).

damages.[235] In 1954, the court affirmed a punitive damages award of $1850 in a fraud case, *Howell v. Associated Hotels, Ltd.*, even though there were no special damages awarded.[236] In *Howell*, the plaintiff, a professional photographer, had given the defendant eighteen ektachrome transparencies to sell to a third party. Plaintiff sought return of the transparencies after learning that defendant had retained them instead of selling them. Defendant ignored plaintiff's request, made little or no effort to restore the transparencies, and claimed that he could not find them, even though he actually had them in his possession.[237] Placing Hawaii in the minority of states that allow punitive damages for injury to property (and in cases without special damages), the Court acknowledged Hawaii's rule was "not universal," but nonetheless approved punitive damages in trespass to property cases where there is "special misconduct and aggravation."[238]

In the 1961 case *Anderson v. Knox*, the Ninth Circuit Court of Appeals applied the *Bright* rule to a Hawaii case and affirmed an award of $10,000 in punitive damages against an insurance salesman who sold an unsuitable insurance policy to the plaintiff on Maui.[239] Relying on defendant's numerous misstatements and omissions, plaintiff purchased the policy, which resulted in the dissipation of the cash value of plaintiff's old insurance policy and the prospect of an indebtedness of $125,000.[240] Defendant's deceit was sufficient to sustain the award.

C. Beyond Personal Injury: Punitive Damages Available in a Broad Range of Cases

The Hawaii punitive damages standard has supported punitive damages awards in a wide variety of cases. The myriad manifestations of malicious, reckless, and extremely careless behavior crop up not just in personal injury cases, but in many other contexts as well. In the reported appellate decisions, the Hawaii courts have allowed awards without any categorical limitation, including cases involving: defendant public officials[241] (although

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[235] Hawaii courts do not, however, allow the double recovery of punitive damages and statutorily authorized treble damages. *See* Han v. Yang, 931 P.2d 604 (Haw. Ct. App. 1997); *see also* Cieri v. Leticia Query Realty, Inc., 905 P.2d 29 (Haw. 1995). Hawaii case law has resolved that "the recovery should be either treble damages or punitive damages, whichever is the greater amount." *Han*, 931 P.2d at 619 (citing Eastern Star, Inc. v. Union Bldg. Materials Corp., 712 P.2d 1148, 1160 (Haw. 1985)).

[236] Howell v. Associated Hotels, Ltd., 40 Haw. 492 (1954).

[237] *Id.* at 492-93.

[238] *Id.* at 493-94.

[239] Anderson v. Knox, 297 F.2d 702, 728 (9th Cir. 1961).

[240] *Id.* at 726-27.

[241] A public official, acting in his or her scope of employment, is not immune from punitive damages. In *Kajiya v. Department of Water Supply*, 629 P.2d 635, 640 (Haw. Ct. App. 1981), the Intermediate Court

governmental entities are protected from punitive damages[242]); bad faith insurance claims;[243] and, multiple tortfeasors for their individual conduct[244] (but not under a vicarious liability theory[245] or under a joint and several liability theory[246]).

Some specific areas of broad liability are worth mentioning in more detail because they belie the perception that punitive damages are the exclusive province of personal injury cases and show that they are often sought in property and business disputes. For example, in 1983, the Intermediate Court of Appeals applied the basic malice or aggravation standard in *Lussier v. Mau-Van Development, Inc.*, [247] a case of first impression involving a shareholder's derivative action. The court held that a court in equity could impose punitive damages "where the acts complained of are done willfully, wantonly or maliciously or is [sic] characterized by some aggravating circumstances."[248] In the 1997 case, *Lee v. Aiu*, a dispute over title to real property in Hilo, the Supreme Court held that there was "substantial evidence from which the jury could find that the Dixons engaged in aggravated or outrageous misconduct," and therefore the Court affirmed the $40,000 punitive damages award."[249] In *Clog Holdings v. Bailey*,[250] a 1999 decision

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of Appeals held that a Maui public water supply official who added chlorine to a water system that killed plaintiff's valuable pet Japanese carp (koi) fish could be held punitively liable for an exercise of official discretion if he acted maliciously.

[242] In *Lauer v. Young Men's Christian Ass'n*, 557 P.2d 1334 (Haw. 1976), the Hawaii Supreme Court held that a municipal corporation may not be liable for punitive damages, although individual employees may be. The Court reasoned that allowing punitive damages against a municipal corporation is contrary to public policy. *Id.* at 1343.

[243] *See* Best Place, Inc. v. Penn. America Ins. Co., 920 P.2d 334 (Haw. 1996) (extending punitive damages to bad faith insurance claims).

[244] When two tortfeasors commit an act deserving of a punitive award, the Hawaii courts have held that punitive damages may be assessed against both parties. *See, e.g.*, Beerman v. Toro Mfg. Corp., 615 P.2d 749 (Haw. Ct. App. 1980) (allowing child whose eye was severely injured by debris from a lawnmower while standing in line at a school water fountain to proceed against manufacturer and distributor on remand, but noting that "there are Hawaii Supreme Court cases holding that punitive damages may be recovered against corporate defendants, such as Toro or Inter-Island, only if the corporations expressly or impliedly authorized the allegedly tortious act before or after it was committed").

[245] In *The City of Columbia*, 11 Haw. 693 (Haw. Rep., 1899), the Supreme Court of the Republic of Hawaii stated a master could be liable for punitive damages if "the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose, however ill advised or improper, ... though the servant may have executed it willfully and maliciously." *Id. See also* Kealoha v. Halawa Plantation Ltd., 24 Haw. 579 (Haw. Terr. 1918), *modified*, 24 Haw. 597 (Haw. 1919) (punitive damages allowed against principal only if he participated in the acts of the agent).

[246] *See* Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 954 P.2d 652, 669 (Haw. Ct. App. 1998), *aff'd in part, rev'd on other grounds*, 954 P.2d 644 (Haw. 1998).

[247] Lussier v. Mau-Van Development, Inc., 667 P.2d 804, 824 (Haw. Ct. App. 1983).

[248] *Id.* at 825 (citations and internal quotations omitted) (deciding, however, that the standard was not met and upholding a directed verdict for the defendant on this issue).

[249] Lee v. Aiu, 936 P.2d 655 (Haw. 1997). The Court remanded, however, to allow plaintiff the

involving a highly controversial dispute over access to the shoreline on property owned by Beatle George Harrison in Nahiku, Maui, the Supreme Court found that punitive damages could be awarded "when a defendant maliciously obstructs an easement . . . despite the defendant's claim, unsupported by a reasonable belief, that no easement existed."[251] Accordingly, applying the higher *Masaki* standard of proof, the Court remanded to allow an award if the jury could find with "convincing clarity" that the defendant met the substantive *Bright* standard.[252]

In Hawaii, as clarified in the landmark 1989 *Masaki v. General Motors, Inc.* case, punitive damages are also available in products liability actions.[253] In *Masaki,* the plaintiff Stephen Masaki, a mechanic, was severely injured when a GM van he was working under unexpectedly shifted into reverse from park, hitting his head and breaking his neck.[254] Stephen and his parents alleged that GM knew of the defect but failed to fix it; even GM's expert testified that the company could have installed an active warning system "at a low cost."[255] On the punitive damages issue, the Supreme Court defined the limits of the complex *Bright* standard by noting that a punitive award is appropriate when "the defendant's wrongdoing has been intentional, and deliberate, and has the character of outrage frequently associated with being a crime."[256] The Court stated that an award requires "something more than a mere commission of a tort."[257] Although the Court held that defendant's mental state, not just conduct, was critical to the awarding of punitive damages,[258] the Court ultimately affirmed a broad interpretation of the punitive damages standard by allowing such awards for products liability cases where an inquiry into a corporation's "mental state" is often a question of whether it considered and rejected a low-cost alternative.[259]

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opportunity for a higher award because the Court found she was entitled to introduce evidence of the attorneys fees she had incurred because of defendants' conduct. *Id.* at 670-671.

[250] Clog Holdings v. Bailey, 985 P.2d 1062 (Haw. 1999). The Court's decision in *Clog* had no precedential value as the Court later ordered it vacated (Jan. 7, 2000), issued a superseding opinion, 2000 WL 121820 (Feb. 1, 2000), and ordered both opinions withdrawn from the bound volume for unspecified reasons (Apr. 20, 2000).

[251] 2000 WL 121820 at *21.

[252] *Id.* at *22.

[253] 780 P.2d at 573 (citing *Bright* standard).

[254] *Id.* at 569.

[255] *Id.* at 580.

[256] *Id.* at 570 (citing W.P. KEETON, PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 908, cmt. b).

[257] PROSSER & KEETON, *supra* note 256, at 573.

[258] *See* 780 P.2d at 570.

[259] *Id.* at 572-73 ("We see no reason why punitive damages may not also be properly awarded in a products liability action based on the underlying theory of strict liability where the plaintiff proves the

The availability of punitive damages as a remedy in products liability cases in Hawaii was reaffirmed by the Court in the 1992 case *Larsen v. Pacesetter.*[260] In *Larsen*, the plaintiff suffered through multiple surgeries to replace a recalled pacemaker that ultimately proved not to be defective.[261] Although the Court upheld the trial court's dismissal of the plaintiffs' punitive damages claims, finding that fraud had not adequately been shown, the Court reiterated that "[p]unitive damages may be recovered in a products liability suit, in the absence of a fraud claim, so long as defendant has acted wantonly or oppressively or with . . . malice."[262]

In another 1992 case, *Norris v. Hawaiian Airlines,* the Hawaii Supreme Court continued to allow broad application of punitive damages, stating in a footnote that, although punitive damages are "not generally available under collective bargaining agreements, if the agreement is silent as to remedies, arbitrators can award punitive damages."[263] Applying this Hawaii law two years later, the Ninth Circuit Court of Appeals reiterated the availability of punitive damages in a Hawaii collective bargaining case where there was "substantial evidence" that the defendant had engaged in "extraordinary misconduct," "acted with malice or wanton indifference," and that his breach "reflected a willful abuse of duty."[264] In Hawaii, even estates of deceased victims can maintain claims for punitive damages under the "willful, malicious, wanton, or aggravated wrongs" standard.[265]

D. Burden of Proof: After 1989, Clearly "Clear and Convincing"

About fifteen years ago, Hawaii's punitive damages jurisprudence took an anomalous conservative turn when the Court joined the majority of states by adopting the more restrictive "clear and convincing" standard for evidence supporting a punitive damages award. Of the forty-six states that allow punitive damage awards, twenty-four states require clear and convincing evidence, four states apply various standards of proof according to the underlying claim, and eight states require only a preponderance of the

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requisite aggravating conduct on the part of the defendant.").

[260] Larsen v. Pacesetter, 837 P.2d 1273 (Haw. 1992).

[261] *Id.* at 1279.

[262] *Id.* at 1288-89 (internal citations omitted).

[263] 842 P.2d 634, 647 (Haw. 1992) (emphasis omitted), *aff'd sub nom. Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

[264] Mano v. Haw. Teamsters & Allied Workers Union, Local 996, 234 F.3d 1277 (9th Cir. 2000).

[265] *Ozaki*, 954 P.2d at 668 (holding that murder victim would have had claim for punitive damages, had she survived, based on underlying claim for assault and battery; therefore holding that, under survival statute, punitive damages claim against murderer survived victim's death and could be asserted by her estate).

evidence.[266] After extensive deliberation, the Hawaii Supreme Court adopted the clear and convincing standard in the 1989 *Masaki* case, finding that the punitive nature of the award warranted a burden higher than the usual preponderance standard in civil cases.[267] According to the *Masaki* court, "punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction."[268] The clear and convincing standard is now well-established Hawaii law on punitive damages.[269]

The *Masaki* Court's adoption of the highest civil burden of proof for punitive damages is the most significant restriction on punitive damages awards in Hawaii, either by the courts or the legislature. However, the actual impact of the ruling may have been minimal, given that, as described above, the Court simultaneously endorsed the long-standing broad standard for such awards and extended the reach of punitive damages to products liability cases.[270] In addition, the higher standard may not matter in cases with tragic facts like *Masaki*.[271] On the other hand, the higher standard enhances a defendant's ability to convince a court to dismiss weak punitive damages claims before trial.[272] Ironically, also in 1989, the number of reported tort judgments in which punitive damages were *requested* had already dropped dramatically—from twenty-two the prior year to only six in 1989, the third lowest number during the seventeen years studied.[273] The number of punitive damages *judgments* that year also dropped dramatically from eight in 1988 to zero in 1989.[274] The year following *Masaki*, the number of requests bounced back, increasing to seventeen of the reported verdicts, and the number of judgments increased to two.[275] The long-term trend on requests and verdicts showed a gradual overall decline after *Masaki*, but it is difficult to discern

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[266] States PD Doctrine Survey, *supra* note 219. As of the 2001 survey, ten states had not addressed the issue.

[267] *Masaki*, 780 P.2d at 574-75.

[268] *Id.* at 575.

[269] *See, e.g., Ditto*, 947 P.2d at 960 (citing *Masaki*).

[270] *Masaki*, 780 P.2d at 572-73.

[271] Masaki's attorney, Howard Glickstein, who settled the case on remand for an undisclosed amount, expressed confidence that a new jury would still have awarded a high punitive damages amount even under the more stringent standard. *See* Ken Kobayashi, *$5 Million Judgment Upheld: Record Damages Awarded to Van Victim*, HONOLULU ADVERTISER, Sept. 21, 1989, at A3 (quoting Glickstein, "we're confident that a jury of 12 fair and impartial people will agree"); *see also* Lee Catterall, *New Trial Ordered for Crippled Man Awarded $11.25 million*, HONOLULU STAR-BULLETIN, Sept. 21, 1989, at A4 ("In my heart, I believe those three words (clear and convincing) would not have made any difference" to the jury, quoting Glickstein).

[272] *See, e.g., Bynum*, 125 F. Supp. at 1257 (dismissing punitive damages claim for lack of evidence under *Masaki* standard).

[273] *See infra* Part IV C 2-3.

[274] *Id.*

[275] *Id.*

whether *Masaki*'s higher burden of proof caused any distinctive depression.

E. Deferential Review of Punitive Damages Awards: "Abuse of Sound Discretion" and "Excessiveness"

The Hawaii courts apply a "sound discretion of the trier of fact" standard in reviewing awards of punitive damages.[276] On appellate review, a punitive award or denial will not be reversed unless there is a clear abuse of discretion.[277] Such an abuse occurs when "[the court] exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party,"[278] for example, if it denies an award but fails to enter sufficient findings of fact and conclusions of law to support its denial.[279]

Hawaii's appellate courts review the *amount* of a punitive award under a deferential "excess" or "outrageous" standard. In *Parnar v. Americana Hotels, Inc.*,[280] the Hawaii Supreme Court upheld a $1.5 million punitive damages judgment in favor of a wrongfully discharged hotel employee under the general rule that a finding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless: 1) palpably not supported by the evidence, or 2) it is so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or were misled by passion or prejudice.[281] This standard for reviewing excessiveness is similar to twenty-one other states that consider whether the award was a product of the jury's passion or prejudice or some other improper element.[282] The same test for appellate review is used when an award is determined in a jury-waived trial.[283]

F. Defendant's Wealth: A Legitimate Factor

The consideration of wealth as a factor in setting the amount of punitive

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[276] *See, e.g.*, Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 982 P.2d 853, 868 (Haw. 1999).

[277] *Id.*

[278] *Id.*

[279] *Id.* at 890.

[280] No. 68-459P, 1988 WL 247984, at *1 (Haw. Aug. 17, 1988). The *Parnar* judgment is one of those included in the study. *See infra* Part V C 2 (discussing Category 2 cases). *See also supra* notes 196-97.

[281] *Parnar*, 1988 WL 247984, at *2 ("The jury found that defendants had discharged Parnar in violation of a clear mandate of public policy, therefore punishment in the form of punitive damages was allowable.").

[282] States PD Doctrine Survey, *supra* note 219.

[283] *See* Romero v. Hariri, 911 P.2d 85, 93 (Haw. Ct. App. 1996) (upholding, in a real estate fraud case, $1 million dollar punitive damages award by trial court judge and advisory jury). *See also* Kang v. Harrington, 587 P.2d 285, 292-93 (Haw. 1978) (discussing remittitur doctrine in review of punitive damages award).

damages can help and hurt both parties. For the most vocal advocates of tort reform, however, it is seen as an illegitimate "deep pockets" factor that unfairly punishes large businesses and professionals such as physicians. Consistent with the Hawaii courts' broad view of punitive damages, juries are allowed to consider the financial worth of the tortfeasor in calculating the amount that would accomplish the desired punitive effect; this is in line with the large majority of jurisdictions that also allow consideration of this factor.[284] The Hawaii Supreme Court has recommended, however, certain safeguards to protect the defendant. In *Dunlea v. Dappen*, a sexual abuse case, the Hawaii Supreme Court generally agreed with the proposition that "discovery of a defendant's assets is not appropriate until there's a prima facie showing in discovery that you are going to get to a jury on punitives," but the Court noted that "the trial court has discretion to fashion appropriate orders and procedures to avoid prejudice to the defendant" short of barring discovery.[285] Wealth is only one factor in setting the amount of the award, and a court is not required to consider it, yet it provides plaintiffs seeking punitive damages against a wealthy defendant a fruitful avenue for increasing the amount of the award.[286] Not surprisingly, some of the reform proposals considered by the Hawaii Legislature would bar wealth as a legitimate factor for the jury's consideration.[287]

G. Actual Damages Not Required

Hawaii is in the minority of states taking the position that punitive damages can be awarded even in cases where there are no compensatory damages. Since the 1954 *Howell* case,[288] the Hawaii courts have held that a plaintiff need not suffer actual damages in order to recover a punitive award. Hawaii is one of seventeen jurisdictions that allow for punitive damages when no actual damages are assessed; twenty jurisdictions refuse to award punitive damages without actual damages.[289] The *Howell* court pointed out the recognized distinction between the injury inflicted and damages awarded as compensation, as well as the very different standards used for calculating the two types of awards. The Court put the decision in the hands of the jury, finding that although "punitive damages must bear some relation to the injury inflicted . . . they need not bear any relation to the damages allowed by way of

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[284] States PD Doctrine Survey, *supra* note 219 (approximately 44 states allow this factor).

[285] Dunlea v. Dappen, 924 P.2d 196, 207 n.12 (Haw. 1996) (internal quotations omitted).

[286] *See Romero*, 911 P.2d at 93.

[287] *See infra* notes 422-23 (discussing S.B. 328, introduced in 2003).

[288] *See* Howell v. Associated Hotels, 40 Haw. 492 (1954).

[289] States PD Doctrine Survey, *supra* note 219.

compensation."[290] The Court recognized the authorities were split on whether punitive damages were appropriate when no actual damages were awarded, but ultimately ruled that such an award was in the interests of "promoting justice."[291] Many of the reform proposals considered recently by the Hawaii Legislature would statutorily reverse this doctrine, either by allowing a punitive award only after a compensatory award has been made or by requiring punitives to be below a certain multiplier of the compensatory award.[292]

In summary, other than Hawaii's adoption of the clear and convincing standard of proof in 1989, the State's decisional law on punitive damages is uniformly liberal – perhaps even the most progressive in the country. This is consistent with the Hawaii state courts' overall approach to tort law, as discussed in Part I, above, which affords plaintiffs broad tort remedies. As explained in Part III, below, despite the constant pressures for "tort reform," the State Legislature has not significantly inhibited these jurisprudential developments and, specifically in the area of punitive damages, has thus far resisted a wide variety of proposals for limitations on the current system.

III. THE LEGISLATIVE CONTEXT: TORT REFORM AND THE HAWAII LEGISLATURE

Adding to the strength of the "socially conscientious" tort jurisprudence in Hawaii is a state legislature that is historically reluctant (or politically unable) to venture far into the judiciary's tort law turf. In recent years, however, the Hawaii Legislature has been under increasingly strong pressure to exert more control over Hawaii tort law, including in the area of punitive damages. Yet, the legislative debate itself is a source of some of the most common misperceptions about punitive damages that are addressed in the Hawaii study. Thus, it is important to analyze the contributions of the legislature to Hawaii tort law both generally and specifically in the areas such as punitive damages targeted by the tort reform movement.

A. The Era of Tort Reform in Hawaii

As part of the national tort reform movement in the mid-1980s, most states

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[290] *Howell*, 40 Haw. at 500-01.

[291] *Id.* at 495 ("The authorities are divided on this question and as there has been no local decision squarely on this subject we may choose that which appears more reasonable in promoting justice.").

[292] *See infra* Part III C; *see infra, e.g.*, note 342 (discussing 1992 Punitive Damages Standards Act).

enacted substantial changes to their tort laws,[293] hoping to limit the number of cases filed, to control the extent of recoveries, and to address perceived unfairness to defendants. In the past fifteen years, the debate in Hawaii over tort reform generally, and controls on punitive damages in particular, has mirrored this national trend.[294] According to the chief lobbyist for the plaintiffs' bar in Hawaii, Bob Toyofuku, the perception of a "litigation explosion" has made tort reform a "high priority" for the legislature since the early 1980s.[295] In his view, the bills introduced "would make it harder for an injured party to recover or [would] reduce the amount that could be recovered. . . . Generally, the legislature has moved toward protecting defendants by reducing the awards a plaintiff can get."[296]

Catching the national wave, in 1986, Hawaii adopted a package of tort reform measures during a specially convened session of the part-time State Legislature. That legislation enacted a mix of temporary and long-term modifications to Hawaii tort law,[297] including a more generous statute of limitations for minor victims of medical torts,[298] consideration of taxes in calculating future earnings,[299] a cap on pain and suffering at $375,000 (with

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[293] Marvell, *supra* note 40, at 194 ("The pleas of the presidential administration of Ronald Reagan and insurance companies were successful in that during 1986 and 1987 most states limited recovery in tort cases by, among other things, putting upper limits on damages, establishing sanctions for frivolous suits, putting limits on punitive damages, and limiting joint and several liability.") (citing Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Torts Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990)). Another wave of legislation occurred in the mid-1990s. *See* G. Robert Blakey, *Corporate Misconduct: Of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 SUM. LAW & CONTEMP. PROBS. 97, 111 n.56 (1997) ("'Tort reform' is carrying the day in the nation. Between 1995 and 1997, twenty-eight states passed some form of legislation; sweeping reform was recently passed in Illinois, Texas, Ohio, and Louisiana.") (citing Letter of Sherman Joyce (undated), President of the American Tort Reform Association, to selected law professors).

[294] Jerry Burris, *Move to Change Liability Law*, HONOLULU ADVERTISER, Feb. 26, 1989, at A3 (noting effort by Hawaii businesses to limit product liability "mirrors activity in many Mainland states and in Congress"); *see also id.* (quoting Bob Toyofuku, spokesperson for Hawaii Academy of Plaintiff Attorneys, as stating that the Hawaii business lobbying was part of a national effort).

[295] Interview by Shaunda Liu with Bob Toyofuku, Spokesperson for Hawaii Academy of Plaintiff Attorneys, Honolulu, Haw. (July 10, 2001).

[296] *Id.*

[297] Not all of these modifications can be considered "reforms." Some changes were "sheep in wolf's clothing," such as the joint and several liability modification that contained several major exceptions including all economic damages in personal injury cases, HAW. REV. STAT. § 663-10.9(1) (2003), and exempted entirely cases in six major tort categories, HAW. REV. STAT. § 663-10.9(2)(A)-(F)(2003), as well as retaining joint and several liability for noneconomic damages when the tortfeasor's fault is 25% or more, HAW. REV. STAT. § 663-10.9(3)(2003). The new "definition" of noneconomic damages, which included pain and suffering, was so broad that is effectively counterbalanced the limitations put in place by the cap on pain and suffering, HAW. REV. STAT. § 663-8.5 (2003).

[298] HAW. REV. STAT. § 657-7.3 (2003).

[299] HAW. REV. STAT. § 663-8.3 (2003).

major exclusions),[300] new limitations on (but not a bar against) negligent infliction of emotional distress claims in property damage cases,[301] the recovery by collateral sources via a lien on judgment,[302] modification (but not abolition) of joint and several liability,[303] and a significant forced three-year rollback of commercial liability insurance rates.[304]

The major reforms passed by the Legislature in 1986, however, included no provisions regarding the lightning-rod issue of punitive damages, and ultimately provided little relief to defendants in the way of true tort reform. Professor Miller observed that the "Hawaii Legislature has clearly felt the need to respond, but in keeping with its liberal Democratic roots and traditions . . . managed very successfully either to adopt changes which may be effective in reducing costs and excluding non-meritorious actions but which do not significantly limit suits, recoveries or damages, or changes which create a mere appearance of reform and which impose only the narrowest of limits on tort recoveries."[305] He wryly concluded: "So much for legislative tort reform."[306]

B. The Mandatory Tort Arbitration System: CAAP

One aspect of the 1986 tort reform package did, however, ultimately have a significant effect on approximately one-fourth of all punitive damages awards: the Court-Annexed Arbitration Program ("CAAP"), which was aimed specifically at diverting smaller-value tort cases from the circuit courts' dockets.[307] The Hawaii Judiciary had initiated CAAP in February 1986 as an experimental program for the circuit courts, under which parties with cases valued under $50,000 could volunteer for the program.[308] Six months later, during the special session, the legislature enshrined CAAP in Hawii Revised Statutes § 601-20, establishing a statewide system of mandatory and nonbinding arbitration for all civil actions in tort having a probable jury value (not reduced by the issue of liability, and exclusive of interest and costs) of

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[300] HAW. REV. STAT. § 663-8.7 (2003).

[301] HAW. REV. STAT. § 663-8.9 (2003).

[302] HAW. REV. STAT. § 663-10 (2003).

[303] HAW. REV. STAT. § 663-10.9 (2003).

[304] Act 2, 13th Leg., Spec. Sess., 1986 Haw. Sess. Laws 3-6.

[305] Miller & Komeya, *supra* note 125, at 64.

[306] *Id.* at 65.

[307] *See infra* Part III B. About 25% of all of the punitive damages judgments covered by this study were CAAP cases. *See* Table 2. As of 1992, court arbitration programs were operating in at least twenty states and ten federal district courts. John Barkai & Gene Kassebaum, *Hawaii's Court-Annexed Arbitration Program Final Evaluation Report* (PCR Working Paper Series: 1992-1, Mar. 1992) at iii [hereinafter Barkai & Kassebaum, *1992 CAAP Report*] (on file with author).

[308] *Id.* at 2.

$150,000 or less, which became effective in 1987.[309] CAAP was unique among state arbitration programs because it had the highest jurisdictional limit of all similar programs nationwide,[310] and because its primary goal[311] was to lower litigation costs by limiting pre-trial discovery.[312]

Under the Hawaii Arbitration Rules,[313] tort cases are considered automatically to be "in" CAAP unless the plaintiff certifies at the time of filing that the case value exceeds the $150,000 jurisdictional amount – a certification reviewed by the Arbitration Administrator and subject to review by each Circuit Court Arbitration Judge.[314] Unless the parties select a private arbitrator, the Arbitration Administrator assigns one within twenty days[315] from a panel of qualified arbitrators—local attorneys including both plaintiff and defense tort lawyers, as well as non-tort lawyers.[316] Arbitrators have broad authority to hear the case and "[t]o relax all applicable rules of evidence and procedure to effectuate a speedy and economical resolution of the case."[317] Discovery is allowed at the arbitrator's sole discretion.[318] All arbitrations take place, and all awards are filed, no later than nine months from the date of service of the complaint on all defendants. Unless a party files a written notice of appeal and request for trial *de novo* within twenty days,[319] the clerk of the circuit court enters the arbitration award as a final judgment of the court.[320] In 2001, the legislature amended the arbitration

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[309] HAW. REV. STAT. § 601-20(a) (2003); Barkai & Kassebaum, *1992 CAAP Report, supra* note 307, at 2. The legislature directed the State Supreme Court to adopt rules for the program by January 1, 1987; the rules became effective as of February 1987 for the First Circuit, and later in 1987 for most other circuits. HI. R. CIR. CT. EX. A. ARB. Rule 27.

[310] Barkai & Kassebaum, *1992 CAAP Report, supra* note 307, at iii.

[311] The stated goal of the program was to "provide for a procedure to obtain prompt and equitable resolution of certain civil actions in tort through arbitration." HAW. REV. STAT. § 601-20(a) (2003). *See also* Barkai & Kassebaum, *1992 CAAP Report, supra* note 307, at iii. CAAP's other goals included speeding up the courts' docket, providing litigants a fair hearing, encouraging early settlements, and preventing backlogs and delays. *Id.*

[312] *Id.* at iv.

[313] The Hawaii Arbitration Rules are included as Exhibit A to the Hawaii Circuit Court Rules and are cited as HI. R. CIR. CT. EX. A. ARB. Rule.

[314] HI. R. CIR. CT. EX. A. ARB. Rule 8(A)-(B).

[315] *Id.* Rule 9.

[316] *Id.* Rule 10.

[317] *Id.* Rule 11.

[318] *Id.* Rule 14.

[319] *Id.* Rule 22.

[320] *Id.* Rule 21. Thus, CAAP "awards" are included in the study as Hawaii tort "judgments" but analyzed separately. CAAP awards have the same force and effect as a final judgment of the court in a civil action, but may not be "appealed." HI. R. CIR. CT. EX. A. ARB, Rule 21. If a party seeks trial de novo, then the arbitration award is sealed until after the verdict, and statements or testimony made in the course of the arbitration hearing are not admissible in court, *id.* Rule 23(C), but discovery for the arbitration proceedings is admissible. *Id.* Rule 23(B). Sanctions may be imposed by the circuit court after the verdict against the non-prevailing party who sought the trial, including costs, expert witness fees, costs of jurors, and attorneys

rules specifically to endorse the existing practice of awarding punitive damages in CAAP cases, but the rules now require arbitrators to state with specificity the basis and amount of any punitive damages in the award.[321]

CAAP has significantly changed the nature of tort caseloads in Hawaii—and the system for awarding punitive damages—by keeping smaller-value cases out of the hands of juries and putting them into the hands of practicing attorneys. In 1992, approximately 2,815 tort cases were filed,[322] and approximately 1,500 of these (53%) were eligible for CAAP.[323] Twenty-four percent of the cases assigned to CAAP were later dismissed, exempted, or removed for other reasons.[324] Of the cases that did remain in CAAP, most settled, with about one-third going to an arbitration award[325]; trial *de novo* was sought about 50% of the time[326] (or one of every six CAAP cases[327]). The average CAAP award was $30,000, and 88% of all CAAP cases terminated at $50,000 or less.[328] A comprehensive 1992 study by University of Hawaii Law Professor John Barkai and Sociology Professor Gene Kassenbaum of the first five years of CAAP[329] concluded that, in general, the program somewhat reduced the costs of litigation for the parties and expedited decisionmaking in many but not all cases.[330]

Despite the lack of dramatic cost savings to parties, CAAP has had significant effects on a public scale. Overall, as further discussed below,[331]

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fees not to exceed $15,000, which are then deducted from any award to the plaintiff, who must pay any deficiency. *Id.* Rule 26. To be a prevailing party, a party must either (1) seek trial and improve on the arbitration award by 30% or more, or (2) not seek trial and the "appealing" party fails to improve on the arbitration award by 30% or more. *Id.* Rule 25(A).

[321] HAW. REV. STAT. ANN. § 658A-21 (Michie 2001).

[322] *See* Trend Chart 1, *infra*, p. XX (2689 tort cases filed in 1991/92; 2941 cases filed in 1992/93; averaging 2815 cases filed in 1992).

[323] Barkai & Kassebaum, *1992 CAAP Report*, *supra* note 307, at iii.

[324] *Id.* at v.

[325] *Id.* at vii.

[326] *Id.* at vi.

[327] *Id.* at vii.

[328] *Id.* at vi.

[329] *See id.*; *see also* John L. Barkai & Gene Kassebaum, *Using Court-Annexed Arbitration To Reduce Litigant Costs and To Increase the Pace of Litigation*, 16 PEPP. L. REV. 43 (1989); John Barkai & Gene Kassebaum, *The Impact of Discovery Limitations on Cost, Satisfaction, and Pace in Court-Annexed Arbitration*, 11 U. HAW L. REV. 81 (1989).

[330] Barkai & Kassebaum, *1992 CAAP Report*, *supra* note 307, at iv (CAAP "has significantly reduced pretrial discovery expenses for both plaintiffs and defendants," noting average cost savings of $496 for plaintiffs and $266 for defendants, but finding only a 2.6% increase in recovery for the plaintiff and a 1.2% savings for the defendants, *id.* at viii). Barkai and Kassebaum also observed that, if the volunteer time of arbitrators (paid only an honorarium of $100) were valued at market rates, "almost all of CAAP savings would be eliminated." *Id.* at x. Moreover, CAAP cases that went to the award stage were actually "slower and more expensive than the average case in regular litigation." *Id.* at vii.

[331] *See* Section IV, *infra*.

the increase in the pending tort case rate dropped significantly after CAAP was initiated as cases were diverted from the system.[332] As further discussed in Part IV, CAAP acts as a significant indirect "control" on Hawaii's punitive damages awards by filtering such awards through attorney-arbitrators.

C. Post-1986 Tort Reform Legislation: Focus on Punitive Damages

After 1986, punitive damages became a central issue in the continuing tort reform debate in the Hawaii Legislature. By 1987, tort reform bills were again before the legislature, including proposals to bar punitive damages entirely.[333] The same bills surfaced in 1988,[334] alongside new bills that would prohibit the award of punitive damages specifically against county governments.[335] None of the bills passed.

This was also the year of Hawaii's landmark punitive damages judgment, *Masaki v. General Motors Corporation*, in which a Honolulu jury issued a verdict against GM of $11.25 million in punitive damages and $5.6 million in compensatory damages in favor of 28-year-old mechanic Stephen Masaki and his parents.[336] Whether the *Masaki* verdict fanned the fires of reform is unclear,[337] but the verdict did coincide with a reinvigorated local tort reform movement and added to the pressure on the State Legislature. In 1988, a group of Hawaii businesses formed the Hawaii Product Liability Task Force, hiring lobbyists, lawyers, and public relations specialists to push a new package of tort reform legislation.[338] The Task Force's familiar theme was

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[332] Barkai & Kassebaum, *1992 CAAP Report, supra* note 307, at viii.

[333] S. 0186, 14th Leg., 1987 Sess. (Haw. 1987) (prohibiting the award of punitive damages except where multiple damages allowed by law); S. 0189, 14th Leg., 1987 Sess. (Haw. 1987) (proposing same prohibition).

[334] H.R. 3129, 14th Leg., 1988 Sess. (Haw. 1988) (proposing general prohibition on punitive damages, including medical torts cases, unless approved by court); S. 2751, 14th Leg., 1988 Sess. (Haw. 1988) (companion bill); S. 2089, 14th Leg., 1988 Sess. (Haw. 1988) (prohibiting any punitive damages awards, except where multiple damages allowed by law).

[335] S. 2178, 14th Leg., 1988 Sess. (Haw. 1988) (prohibiting punitive damages awards against counties); S. 2460, 14th Leg., 1988 Sess. (Haw. 1988) (same).

[336] *See supra* notes 253-259 and 267-271 for a discussion of *Masaki.*

[337] When the Hawaii Supreme Court overturned the *Masaki* verdict, the Honolulu papers carried only two small articles on the decision. *See* Ken Kobayashi, *$5 Million Judgment Upheld: Record Damages Awarded to Van Victim*, HONOLULU ADVERTISER, Sept. 21, 1989, at A3 (noting Court's remand on the basis of a new "clear and convincing" standard for punitive damages, and that the jury verdict was "the highest award in Hawaii for a single victim in a personal injury or wrongful death case"); *see also* Lee Catterall, *New Trial Ordered for Crippled Man Awarded $11.25 million*, HONOLULU STAR-BULLETIN, Sept. 21, 1989, at A4 (noting that, although the court reversed on the punitive damages standard, it affirmed the $6.2 million compensatory award, the "largest ever decided for a single family in Hawaii"). Despite the record verdict in *Masaki*, the lead plaintiffs' attorney in the case, Howard Glickstein, observed no "legislative fallout" or "special legislation reaction" from the verdict. Interview with Howard Glickstein, Attorney for Masaki, Honolulu, Hawaii (Apr. 16, 1999).

[338] Jerry Burris, *Move to Change Liability Law*, HONOLULU ADVERTISER, Feb. 26, 1989, at A3.

that the tort liability laws "cause[d] more harm than good" and that some people used the system as "an opportunity for profits rather than as a means to obtain justice."[339] Many of the tort reform bills from previous sessions were re-introduced in 1989, including the bill proposing immunity from punitive damages for the counties,[340] but none passed.

In 1991, the House considered a bill that would have codified the existing broad judicial standard for awarding punitive damages but also tried to control "extreme" awards by limiting punitive damages to two times the compensatory award.[341] The following year, punitive damages received substantial attention among the business community and in the legislature and, for the first time, a comprehensive bill aimed at punitive damages reform was introduced. The proposed Punitive Damages Standards Act contained numerous provisions to limit punitive damages.[342] First, it sought to tighten the higher standard of proof adopted in *Masaki*, by allowing punitive damages awards in personal injury, property damage, economic loss, or wrongful death cases only if the plaintiff proved by "clear and convincing" evidence that the harm was the result of actual malice or fraud. Second, it would have prohibited the introduction of evidence of defendant's financial condition for the purposes of proving a punitive damages claim. Third, it would have screened out more awards by allowing punitive damages only in cases where a compensatory award was made first, then allowing punitive damages only in a bifurcated proceeding. Fourth, it proposed to cap punitive damages at twice the compensatory award. Finally, fifth, it would have prohibited punitive damages in certain drug or food product cases. The ambitious Punitive Damages Standards Act passed only its first reading in the House.[343]

While the legislature was considering the 1992 Act, punitive damages were in the local news. In February 1992, an article appeared in Hawaii's leading business newspaper, *Pacific Business News*, which discussed Rustad and Koenig's national study of punitive damage awards in product liability cases under the surprisingly candid headline "Product Liability Lawsuits Seldom Yield Punitive Damages."[344] Ironically, the two major Hawaii

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[339] *Id.*

[340] H.R. 0328, 15th Leg., 1989 Sess. (Haw. 1989) (same as prior bill); S. 0249, 15th Leg., 1989 Sess. (Haw. 1989) (companion bill).

[341] H.R. 564, 16th Leg., 1992 Sess. (Haw. 1991) (this bill would have allowed award of punitive damages where a tortfeasor's conduct was outrageous, the tortfeasor acted with evil motive, or the tortfeasor acted or failed to act in conscious disregard or indifference to a high degree of risk of physical harm to another person; and it would have limited punitive damages to 200% of the compensatory award).

[342] H.R. 3935, 16th Leg., 1992 Sess. (Haw. 1992).

[343] First Reading of H.B. 3935, 16th Leg., Reg. Sess., 1991 Haw. House J. 111.

[344] Richard T. Sale, *Product Liability Lawsuits Seldom Yield Punitive Damages*, PAC. BUS. NEWS, Feb. 17, 1992, at 19 ("The reputation of punitive damages resulting from product liability cases has been

punitive damages verdicts that soon followed the article were both in business fraud cases, not personal injury cases. In March 1992, a record-breaking punitive damages award of $618,000 was awarded in a realty fraud case[345] and, in September 1992, a jury awarded Paul Brown, Honolulu's premier hairstylist, a record punitive damages award of $3.8 million in a business fraud case against a national accounting firm.[346] By 1993, the momentum for punitive damages reform seemed to have gathered more steam in Hawaii. Several bills were introduced in the State Legislature calling for the complete abolition of punitive damages as a tort remedy.[347] Another bill proposed diverting all punitive damages awards in intentional tort or civil rights cases to the state's victim compensation fund.[348] Additionally, the Punitive Damages Standards Act was re-introduced.[349] Again, however, none of these bills passed.

In 1994, another major flurry of legislative activity to reform the state's tort laws occurred,[350] but no sweeping or specific changes to punitive damages were enacted. The following year, in 1995, the legislature continued to address only discrete types of tort liability,[351] without addressing punitive damages.

In 1996, an effort to reform punitive damages was introduced as part of a general tort reform bill. H.R. 2927 would have allowed punitive damages

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drastically exaggerated, at least that is the finding of one recent study.").

[345] Thomas Kaser, *Punitive Damages Upheld in Realty Case: $618,000 of Total $1,051,000 Award in the '83 Sale of Nuuanu Home*, HONOLULU ADVERTISER, Mar. 18, 1992, at A3 (noting the award was "believed to be the highest punitive damages ever awarded for real estate fraud in Hawaii.").

[346] Thomas Kaser, *Punitive Damages Against Firm in Brown's Lawsuit: $3.8 Million*, HONOLULU ADVERTISER, Sept. 1, 1992, at A5 (discussing lawsuit for fraudulent misrepresentation by Honolulu hairstylist Paul Brown against the accounting firm Arthur Young & Co.). Paul Brown himself later became a target of a punitive damages award in a case involving sexual harassment of a salon employee. *See infra* Part V C 2.

[347] H.R. 833, 17th Leg., 1993 Sess. (Haw. 1993) (prohibiting any court in a tort action from awarding punitive damages); S. 1251, 17th Leg., 1993 Sess. (Haw. 1993) (companion bill). Both bills passed only their first reading in the Senate and House.

[348] H.R. 477, 17th Leg., 1993 Sess. (Haw. 1993).

[349] H.R. 866, 17th Leg., 1993 Sess. (Haw. 1993) (passed first reading in House).

[350] The most important tort bills of the 1994 session would have exempted Hawaii State Government from joint and several liability (HAW. REV. STAT. § 663-10.5 (2003)) and extended the 1986 pain and suffering cap of $375,000 (HAW. REV. STAT. § 663-8.7 (2003)). In response to pressures from particular interest groups concerned about broad tort liability, the legislature adopted "horse tort" immunity (HAW. REV. STAT. § 663B-2 (2003)) and "feed the poor" immunity for charitable organizations (HAW. REV. STAT. § 663-10.6). On the other hand, the legislature also codified strict liability for gun owners (HAW. REV. STAT. § 663-9.5 (2003)).

[351] For example, the legislature specifically created tort liability for drug dealers whose wares caused injuries (HAW. REV. STAT. § 663D (2003)). The legislature also extended the modified joint and several liability statute (HAW. REV. STAT. § 663-10.9 (2003)) and, in a bold move that seemed to shock the plaintiffs' bar into action, adopted pure auto no-fault, only to have it vetoed by the Governor. Statement of Objections to S.B. 1792, 18th Leg., Reg. Sess., 1995 Haw. House J. 931-933.

only for intentional or knowing wrongdoing, limited punitive damages to $250,000 or twice the amount of compensatory awards, whichever was greater, codified the "clear and convincing" standard of proof, and directed the Hawaii Supreme Court to adopt post-trial and appellate review standards for such awards.[352] In December 1996, *Pacific Business News* carried an article on punitive damage awards, noting that Hawaii had few such awards.[353] Despite this sobering good news, the Hawaii business community continued to press for punitive damages reform.

In 1997, the same punitive damages reform proposals from 1996 were reintroduced in H.R. 2927.[354] A novel bill was introduced that would have limited the attorneys fees in cases where punitive damages were awarded to 10% of the value of the award if the award was one million or less, and 5% of the value of the remainder of the award over one million dollars.[355] Neither bill passed. Instead, the Legislature expanded tort liability in several areas.[356]

In 1997, some members of the State Legislature had "had enough" of the continual battering by a stream of tort reform pressures. Seeking to impose a two-year truce, the legislature passed a concurrent resolution that established a task force that eventually called itself "The Tort Law Study Group."[357] The resolution's authors, members of the Senate Judiciary Committee, expressed concern about the impact of the tort system on the "cost of doing business" and the damage that "abusive" tort cases caused to the common law tort system.[358] They also stated that "the piecemeal enactment of [reform] may prejudice the claims of deserving injured parties or fundamentally imbalance

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[352] H.R. 2927, 18th Leg., 1996 Sess. (Haw. 1996) (passed first reading in House); S. 2571, 18th Leg., 1996 Sess. (Haw. 1996) (companion bill). *See also* H.R. 3718, 18th Leg., 1996 Sess. (Haw. 1996) (proposing to limit punitive damages to twice the compensatory award and require a finding of actual malice or fraud by clear and convincing evidence).

[353] Jacob Kamhis, *Punitive Damage Award Tax May Change Amounts Requested*, PAC. BUS. NEWS, Dec. 27, 1996, *available at* http://pacific.bizjournals.com/pacific/stories/1996/12/30/story5.html (last accessed June 20, 2004)(Alan Van Etten, an attorney with Damon Key Bocken Leong & Kupchak commented that cases with significant punitive damage awards are rare in the islands.).

[354] H.R. 1165, 19th Leg., 1997 Sess. (Haw. 1997).

[355] H.R. 0259, 19th Leg., 1997 Sess. (Haw. 1997).

[356] The legislature codified the requirements for liability waivers signed by clients of risky recreational activities operators (HAW. REV. STAT. § 663-1.54 (2003)), but, in an ironic twist of political fortunes, industry actually received *less* protection under the new law than before. For a compelling account of the politics of this bill, see Ammie Roseman-Orr, *Recreational Activity Liability in Hawaii: Are Waivers Worth the Paper on Which They Are Written?*, 21 U. HAW. L. REV. 715 (1999). The legislature added reciprocal beneficiaries as a plaintiff class under the State Wrongful Death Act (HAW. REV. STAT. § 663-3 (2003)), but granted yet another special interest group immunity from tort lawsuits, this time the Hawaii motor-sports industry (HAW. REV. STAT. § 663-10.95 (2003)).

[357] S.C.R. 256, H.D. 1, 19th Leg., 1997 Sess. (Haw. 1997).

[358] *Id.* (whereas clause).

or disrupt the system of common law tort liability,"[359] and that "both businesses and consumers would benefit by a systematic evaluation of the appropriate nature, scope, and application of tort immunity and other adjustments to our tort system in order to reduce transaction costs as a system driver."[360] Accordingly, the legislature requested the Hawaii State Bar Association to conduct a study of Hawaii's tort law system and make recommendations regarding the role of insurance, attorneys fees, transaction costs, statutory immunity, and other definitive resolution mechanisms, as well as other ways for ensuring recovery by wronged parties while reducing transaction costs.[361] The legislature specified the segments of the legal and business community from which the members of the study group were to be drawn.[362] Although it provided no resources or staff for the research or writing of the report, the legislature ordered a final report in two years, by January 1999.[363]

Despite the legislature's valiant attempt to force a cease-fire in the tort reform battle, the lobbying continued, and even intensified, while the Tort Law Study Group process was underway. In 1998, a new alliance of 240 "local" Hawaii businesses, now constituted as the Hawaii Coalition To Stop Lawsuit Abuse, began to push vigorously for tort reform.[364] One of the Coalition's target areas for reform was punitive damages because, as it stated: "In the United States today, there are more lawsuits, involving more dollars in punitive damages, than in any other five countries combined."[365] The Coalition's familiar mantra was "too many people now look at our courts as an opportunity for profit, rather than as a means of obtaining justice."[366] The

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[359] *Id.*

[360] *Id.*

[361] *Id.* (resolved clause).

[362] *Id.* Those included: representatives of Hawaii's business community organizations, plaintiffs' attorneys, insurance industry, appropriate state and county government agencies, the Judiciary, and torts scholars from the University of Hawaii Richardson School of Law. *Id.* It is the last provision that invited the author of this article to join the study group.

[363] Upon request of the group members, all of whom volunteered hundreds of hours in two years of meetings, the Hawaii Judiciary's Center for Alternative Dispute Resolution provided invaluable staff and facilitation services to the Group. *See* Letter from Elizabeth Kent, Director, CADR, to Senators Norman Mizuguchi and Calvin Say (Dec. 22, 1998), in TORT LAW STUDY GROUP REPORT TO THE 1999 SESSION OF THE HAWAII STATE LEGISLATURE PURSUANT TO S.C.R. 256, H.D. 1 (1997), Dec. 31, 1998 (on file with author). Policy, doctrinal, and original empirical research projects were conducted pro bono by the author and a team of law students from the William S. Richardson School of Law, including: Jean Campbell, Garrick Lau, Kristin Masuda, Naoko Miyamoto, Philip Miyoshi, Deborah Mueller, William Keoni Shultz, and Elise Tsugawa.

[364] Jim Boersema, *Frivolous Lawsuits Are Out of Control*, PAC. BUS. NEWS, Feb. 6, 1998, *available at* http://pacific.bizjournals.com/pacific/stories/1998/02/09/editorial1.html (last accessed June 20, 2004).

[365] *Id.*

[366] *Id.*

Coalition blamed the tort system for a variety of ills, including hidden "tort taxes" on goods; soaring health costs; reduced access to some professional services; rising liability and malpractice insurance costs; fewer product innovations; and fewer opportunities for local business to invest in new jobs and expand operations.[367] The Coalition pointed to other states' sweeping tort reform efforts and touted Alabama's new business-friendly campaign, suggesting anti-business tort law contributed to Hawaii's economic slump,[368] which was triggered by the huge drop in investment in Hawaii businesses and real estate when Japan's economy conflated in the early 1990s.[369]

The number of bills introduced in 1998 relating to punitive damages alone expanded in scope and increased dramatically to seven bills. Dozens of businesses lined up to testify on behalf of the bills, some telling personal stories of lawsuits against them that amounted, in their view, to "extortion."[370] One of the bills the Coalition introduced sought to limit punitive damages and to require a portion of any award to be paid to the state.[371] Another proposal that passed the House but died in the Senate would have, as part of a broader tort reform package, required any punitive damages award to be set by the judge not the jury; limited punitive damages to three times the compensatory award; diverted one-third of any punitive damages award to the state treasury; and required the judiciary to track and report such awards each year.[372] Other bills would have required any punitive damages awards to be determined by a judge and capped them at $250,000.[373] One bill would have allowed punitive damages only for intentional or knowing misconduct; required the plaintiff to prove by clear and convincing evidence that the defendant's conduct warranted punitive damages; limited the dollar amount to

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[367] *Id.*

[368] *Id. See also* Lori Tighe, *A Lesson in Hawaii Law: This Could Happen to You*, HONOLULU STAR-BULLETIN, Feb. 11, 1998, at A1 (quoting member of Hawaii Coalition To Stop Lawsuit Abuse as suggesting that businesses avoided Hawaii because of its tort system; paraphrasing State Representative Terrance Tom as saying that "Hawaii's reputation for being lawsuit-happy has repelled potential businesses from coming to the state").

[369] See *infra* Part IV D 3 for a discussion of Hawaii's economic downturn in the 1990s.

[370] Craig Gima, *Business Owners Tell Lawmakers They Need Tort Reform Right Now: A House Bill to Stop Frivolous Injury and Damage Lawsuits Does Not Get a Senate Hearing*, HONOLULU STAR-BULLETIN, April 9, 1998, at A4 (noting testimony of Alan Shimamoto regarding a lawsuit against his parents for leaking gas tanks and stating such lawsuits are "almost like extortion").

[371] Craig Gima, *Tort-Reform Measure Amended, Advances*, HONOLULU STAR-BULLETIN, Feb. 11, 1998, at A8.

[372] H.R. 2544, 19th Leg., 1998 Sess. (Haw. 1998); S. 2557, 19th Leg., 1998 Sess. (Haw. 1998) SD1, HD1 (HSCR 1273-98) (companion to H.R. 2544; same proposals regarding punitive damages).

[373] H.R. 2717, 19th Leg., 1998 Sess. (Haw. 1998); H.R. 3399, 19th Leg., 1998 Sess. (Haw. 1998) (same bill); S. 2415, 19th Leg., 1998 Sess. (Haw. 1998) (companion bill); S. 2728, 19th Leg., 1998 Sess. (Haw. 1998) (same bill).

the greater of $250,000 or twice the amount of compensatory damages; and required the Hawaii Supreme Court to adopt rules establishing post-trial standards and appellate guidelines for judicial review of punitive damages awards.[374]

Public debate over the bills mirrored the national polemic. One major Hawaii newspaper supported the Coalition's efforts, suggesting that major tort reform was needed "this session" because "Hawaii is one of the few states that have failed to revise their legal system in recent years" to control frivolous lawsuits and limit "outlandish compensation."[375] The editorial specifically supported a proposal to limit punitive damages. Reform would, in the editorial's view, replace greed with fairness, and turn the courts from a menace to business into an arena for equitable resolution.[376] In a February 1998 *Pacific Business News* article entitled "Frivolous Lawsuits Are Out of Control," Jim Boersema called for tort reform in Hawaii similar to reform measures taken in Alabama, claiming they had spurred economic growth.[377]

Plaintiffs' lawyers countered by calling the claims of the Coalition "myths."[378] Richard Turbin, a prominent Honolulu torts attorney and then chair-elect of the 35,000-member national Tort and Insurance Practice Section of the American Bar Association, argued that "[c]urrent facts" belied the popular myth among Hawaii's political culture that legislation was needed to limit lawsuits.[379] Rising to the rhetorical challenge, the plaintiffs' bar, too, used powerful imagery:

> [t]he public is being misled by claims that there is a frivolous lawsuit problem escalating in America. Clearly, the driving force[s] behind the fallacy are powerful insurance business interests that finance lobbying efforts for legislation to limit consumer lawsuits. Fortunately, our civil justice system offers a way for ordinary people to hold Hawaii's power elite accountable. . . . America's legal system is a linchpin of

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[374] H.R. 1165, 19th Leg., 1998 Sess. (Haw. 1998).

[375] Editorial, *Major Tort Reform is Needed This Session*, HONOLULU STAR-BULLETIN, Feb. 12, 1998, at B1.

[376] *Id.*

[377] Boersema, *supra* note 364. Boersema's assertion that Alabama had "enjoyed double digit growth for the past five years" attributable to Alabama's "sweeping reform of state tort laws," *id.*, was misplaced optimism according to a later report indicating that "Alabama's tort reform package had been virtually abolished during this period of economic prosperity." Chad E. Stewart, Comment, *Damage Caps in Alabama's Civil Justice System: An Uncivil War Within the State*, 29 CUMB. L. REV. 201, 230 (1999).

[378] *See* Richard Turbin, *The Myth of Frivolous Lawsuits: Tort Reformers Can Pick Another Cause; Hawaii Doesn't Have a Problem with Rampant Litigation*, HONOLULU STAR-BULLETIN, Feb. 21, 1998 at B1.

[379] *Id.*

> democracy. If we restrict citizen's access to the courts, we are crippling the democratic order.[380]

While the debate raged and tort reform bills were moving along in the House, the Senate Judiciary Committee tried to forestall action by pointing to the ongoing Tort Law Study Group effort. Senate Consumer Protection Committee Chair Wayne Metalf expressed his concern that there was a lack of information on tort lawsuits in Hawaii, saying, "If we're going to enact fundamental changes to the system, there has to be a factual basis to do it."[381] Not surprisingly, little about Hawaii tort law actually changed during the 1998 session.[382]

The Tort Law Study Group finished its voluminous report[383] on December 31, 1998, and presented it to the Legislature in January 1999.[384] The group made consensus recommendations[385] in six major areas: 1) joint and several liability: recommending retention of the existing law but mandating larger insurance coverage and institution of a tracking system; 2) punitive damages: recommending no change in the current system of punitive damages awards by juries with review by judges; 3) immunity: recommending granting immunity sparingly and using a comprehensive rather than piecemeal approach; 4) costs of litigation: recommending allowing any party to submit an Offer of Judgment under Rule 68 and allowing videotape testimony; 5) liability insurance: recommending higher motor vehicle liability insurance limits, and mandatory liability insurance for licensed professionals and businesses; and 6) joint and several liability: recommending it be eliminated for those defendants who obtain sufficient insurance coverage.[386]

The report prompted the Senate to consider several innovative reform

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[380] *Id.*

[381] *See* Gima, *supra* note 370, at A4.

[382] The 1998 legislature did, however, expand immunity in more discrete areas, this time for employers giving job references (HAW. REV. STAT. § 663-1.95 (2003)) and for hotels whose guests used recreational sports equipment (HAW. REV. STAT. § 486K-5.6 (2003)).

[383] The final report and its appendicies are available from the author.

[384] Informational Briefing, Committee on Judiciary & Committee on Commerce & Consumer Protection, Hawaii State Senate, 20th Legislature, 1999 Sess., January 27, 1999 (informational briefing to allow representatives of the Tort Law Study Group, including the author of this article, to present the findings and recommendations contained in the report) (on file with author).

[385] The Tort Law Study Group explicitly adopted a group consensus approach to its deliberations. *See* Tort Law Study Group Report, *supra*, note 363, Part I, Section A, Report Summary, at 2. Although this approach "meant that any proposal had to be accepted by all the various interests represented on the TLSG — including business, plaintiffs' counsel, and defendants' counsel," it adopted this approach to "provide[] the best foundation for legislative consideration of these highly controversial and important issues." *Id.*

[386] *Id.* at 5-6.

measures,[387] but did not quell the debate over the main tort reform issues, including punitive damages. Once again, the House passed a reform package but the legislation stalled in the Senate.[388]

Many of the primary rhetorical claims tested by this article's study were well articulated in the legislative debate in 1999. The proposal to put punitive damages awards in the hands of judges not juries and to limit them to three times the compensatory amount was re-introduced as House Bill 2544; again, the bill passed the House but died in the Senate.[389] The bill asserted: "The Legislature finds that in recent years, the number of punitive damages claims asserted have increased dramatically."[390] The effect, according to the bill, was "to raise the cost of litigation, undermine confidence in the civil justice system, handicap Hawaii's businesses in competition with foreign enterprises, and generally increase the cost of doing business in the State."[391] A bill in the House proposed similar limits, but required that one-third of the award would go to the State Treasury.[392] A Senate version would have limited punitive damages to three times the compensatory award but required 100% to be given to the State.[393] Plaintiffs' lawyers fought back with testimony that featured stories of severely injured plaintiffs who had received just and fair recoveries under the current tort system.[394]

The public testimony presented at the hearings on Senate Bill 2557 is indicative of the tenor of the debate over punitive damages and tort reform in Hawaii.[395] In general, business owners and insurance companies supported the bill, while plaintiffs' attorneys and the judiciary[396] expressed concern.

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[387] As a result of the Tort Law Study Group recommendations, in 1999, the legislature passed modifications to Rule 68 to increase the settlement value of the offer of judgment rule. HI. R. CIV. P. 68 (amendment effective July 1, 1999).

[388] Craig Gima, *Insurers: Liability findings could increase rates: A Tort Law Study Group Recommends Higher Limits on Motor Vehicle Liability,* HONOLULU STAR-BULLETIN, Jan. 27, 1999, at A1.

[389] Re-referral of H.B. 2544 to Comm. on Commerce, Consumer Protection, & Info. Tech., then to the Comm. on Judiciary, 19th Leg., Reg. Sess., 1998 Haw. Sen. J. 331, [hereinafter *H.B. 2544 Re-Referral*].

[390] H.R. 2544, 19th Leg., 1998 Sess. § 17 (Haw. 1998); *see also* S. 2557, 19th Leg., 1998 Sess. (Haw. 1998).

[391] H.R. 2544, 19th Leg., 1998 Sess. § 17 (Haw. 1998).

[392] H.R. 1695, 20th Leg., 1999 Sess. (Haw. 1999); *see also* S. 500, 20th Leg., 1999 Sess. (Haw. 1999) (companion).

[393] S. 739, 20th Leg., 1999 Sess. (Haw. 1999).

[394] Craig Gima, *Attorney Criticizes Cap on Damages for Personal Injury,* HONOLULU STAR-BULLETIN, Jan. 27, 1999, at A10 (citing remarks of Arthur Park, who represented a severely injured boy electrocuted by a powerline).

[395] *See H.B. 2544 Re-Referral, supra* note 389.

[396] The judiciary's concerns were three-fold: first, that the proposed obligation of the judiciary to deposit one-third of any punitive damages award in the general fund had constitutional infirmities; second, that judges deciding the amount of punitive damages that would then be partially diverted to the state general fund might have a conflict of interest; and, third, the scheme would impose an additional management burden on the courts. *Id.* (statement of Michael F. Broderick, Administrative Director of the

Proponents of the bill saw punitive damages reform as a way of "improving Hawaii's economic climate and making our state a more attractive place to do business."[397] Murray Towill, then-President of the Hawaii Hotel Association, testified that "[p]otential judgments, settlements, and legal costs seriously escalate the cost of doing business."[398] A real estate broker testified that the system was "particularly unfair to small businesses and sole practitioners who are defendants in civil cases."[399] He suggested barring punitive damages altogether.[400] An accounting firm business owner testified that the current laws "promote frivolous litigation . . . add undue liability and discourage business in Hawaii, [and] stifle innovation."[401]

Echoing the national tort reform rhetoric, Carolyn Fujioka, on behalf of the Small Business Council of the Chamber of Commerce of Hawaii, stated that "punitive damages should not be routinely included in lawsuits and should not be allowed in cases involving ordinary negligence."[402] She added:

> The threat of large punitive damage awards, even when the injured person is largely responsible for [his] own injury, also creates huge unknown exposures for businesses. The growth in large punitive damage awards points out the increased effort to reach further into businesses' "deep pockets." . . . Recently, plaintiffs' attorneys are demanding punitive damages for even slight misconduct by a defendant. Businesses are sometimes forced to settle a case they know they should win because they fear the possibility of a runaway verdict that could put them out of business. Business has to pass these types of costs on to consumers, so we all end up paying more because of excessive punitive awards and settlements.[403]

Regardless of the lack of supporting data, Fujioka's arguments captured the views of many in Hawaii's business community and this strong perception of a burden on Hawaii's economy obviously troubled the Legislators.

Yet, according to the plaintiffs' bar, "there [was] no rash of punitive damages awards which have caused a negative impact on Hawaii's

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Courts and Clyde Namuo, Deputy Administrative Director of the Courts).

[397] *Id.* (statement of Carolyn Fujioka, testifying on behalf of the Small Business Council of the Chamber of Commerce of Hawaii).

[398] *Id.* (statement of Murray Towill, President of the Hawaii Hotel Association).

[399] *Id.* (statement of C. Scott Bradley, Managing Director, Coldwell Banker Pacific Properties).

[400] *Id.* ("The award to the defendant should be limited to their actual damages.").

[401] *Id.* (statement of Howard Kam, Managing Director, Horwith, Kam & Co.).

[402] *Id.* (statement of C. Fujioka).

[403] *Id.*

businesses."[404] The testimony of Gary Galiher, the state's leading asbestos plaintiffs' attorney, appealed to local interests:

> According to the information in the compilation of personal injury judgments, the largest awards of punitive damages were in cases involving multi-national manufacturers.[405] By limiting the largest awards of punitive damages against the multi-national manufacturers, money which would otherwise properly go to Hawaii's victims or their family would simply remain as a windfall to the foreign corporations.[406]

Galiher asserted that the push for changes in tort law had been based on insufficient, incorrect, misleading or inappropriate data. He concluded:

> Hawaii has one of the most stringent requirements for awarding punitive damages in the United States. Before punitive damages can be awarded, the victim must prove by clear and convincing evidence that the defendant acted maliciously, wantonly, or with criminal indifference toward the victim. The judiciary provides the proper gatekeeping device as well as the appropriate control on the award of punitive damages when they are truly called for. The legislature should have confidence in the civil jury system, especially when there is no evidence that jury awards in Hawaii are disproportionately large when compared with the injuries suffered by our residents.[407]

The arguments of Galiher and the other members of the plaintiffs' bar proved persuasive to the State Legislature.

Ultimately, the punitive damages proposals of 1999 failed. A significant tort reform bill did pass the Senate and House, only to be substantially watered down in Conference Committee.[408] Conscious that the Tort Law Study Group did not recommend "sweeping changes to the present theories of liability and recovery," the Conference Committee proposed a variety of

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[404] *Id.* (statement of Gary O. Galiher, attorney).

[405] Galiher was, most likely, referring to the 1998 *Masaki* judgment against GM Motors and the 1993 *Tabieros* case (*see* Tabieros v. Clark Equipment Co., 944 P.2d 1279, 1292-93 (1997)(background on facts of the case). His statement that this type of case generated the highest average punitive damages awards is correct (*see infra* Part IV C 5 and Part IV C 7 (discussing Category 7 cases), the latter section showing a mean award for this category of cases of $5.651 million. However, adding strength to his argument, these are the *only two* such cases since 1985 involving "multi-national manufacturers" and both awards were *reversed* on appeal. *See infra* notes 445 & 535 and accompanying text.

[406] *H.B. 2544 Re-Referral, supra* note 389 (statement of Galiher).

[407] *Id.*

[408] Conf. Comm. 20-39, 1999 Sess. at 1-2 (Haw. 1999) (on file with author).

minor modifications to the tort law system,[409] but did not recommend any major changes or address punitive damages.[410] Proponents of legislative tort reform who had tried year after year to push a variety of measures through the legislature to no avail were exhausted and frustrated.[411] Senator Randy Iwase, who futilely championed tort reform during the 1999 session, summarized the situation: "I'm mad as hell."[412]

The 2000 session was relatively quiet compared to 1999.[413] Once again, tort reform advocates were disappointed. Small businesses were left out of reform because, according to Representative Ed Case, "[t]here is too much resistance from the plaintiffs' bar."[414]

In 2001, several of the previously rejected bills on punitive damages were once again introduced in the House and Senate.[415] Premised on the now

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[409] *Id.* at 1-3 (attaching S. 186, 20th Leg., 1999 Sess. (Haw. 1999)). The reforms included: codification of the Hawaii Supreme Court's 1999 *Francis* decision that barred tort damages for breach of contact cases, *see supra* notes 193-194 and accompanying text; new rules on third-party practice; modified rules on attorneys fees and costs for frivolous cases; the abolition of joint and several liability for design professionals and certified public accountants in actions not involving physical injury or death. *Id.* at 2-3.

[410] The legislature continued, through other bills, to create only discrete new liabilities and immunities, passing new civil liability for "prostitution coercion" (HAW. REV. STAT. § 663J-3(2003)); expanded immunity for individuals who administered defibrillation treatment in emergencies (HAW. REV. STAT. § 663-1.5 (2003)); and immunity for Y2K bugs (HAW. REV. STAT. Chapter 663M (repealed 2003)).

[411] During the 1998 Legislative Session, the small business caucus introduced 24 business-related bills "only four made it to committee hearings, and not one became law." Malia Zimmerman, *Caucus Pushing Small Business*, PAC. BUS. NEWS (Jan. 29, 1999), *available at* http://www.bizjournals.com/pacific/stories-/1999/02/01/story1.html (last accessed June 20, 2004).

[412] Senator Randy Iwase, *Taking Issue*, PAC. BUS. NEWS (May 14, 1999), *available at* 1999 WL 800090322. One bill during the 1999 session, S.B. 186 (which passed the House), would have "discouraged frivolous lawsuits." Senator Norman Sakamoto, *Good Business Inventions Weakened in Legislative Session*, PAC. BUS. NEWS (May 14, 1999), *available at* 1999 WL 8090326 (noting that "bills addressing fundamental issues like tax reduction, tort reform, and restructuring civil service were watered down" during the session). Tort reform was one of eight issues on the agenda of small business advocates during the 1999 session. Malia Zimmerman, *Small Business Caucus Bills Surviving Late Into Session*, PAC. BUS. NEWS (April 9, 1999), *available at* http://pacific.bizjournals.com/pacific/stories/1999-/04/12/story4.html (last accessed June 20, 2004).

[413] County lifeguard services immunity passed but was vetoed. S. 2001, 20th Leg., 2000 Sess. (Haw. 2000) (deferred, then passed during the 2002 session as S. 796, 21st Leg., 2002 Sess. (Haw. 2002) extending repeal date to 2007). In 2000, the legislature also expanded the 1986 immunity for blood drawers to drug and urine testers (HAW. REV. STAT § 663-1.9 (2002)).

[414] Malia Zimmerman, *Issues & Answers: It's A Spanking-New Millenium, But Will It Be the Same Old Story at the Legislature?*, PAC. BUS. NEWS (Jan. 14, 2000) *available at* http://pacific.bizjournals.com/pacific-/stories/2000/01/17/story5.html (last accessed June 20, 2004) (quoting Representative Ed Case). *See also* Malia Zimmerman, *Small-Business Group Targets Legislative Goals*, PAC. BUS. NEWS (Nov. 29, 1999), *available at* http://pacific.bizjournals.com/pacific/stories/1999/11/29/story5.html (last accessed June 20, 2004) (discussing the lobbying plans on tort reform by local members of the National Federation of Independent Businesses).

[415] Many other tort reform measures, particularly request for special interest immunity, also failed as well. *See, e.g.*, H.R. 1248, 21st Leg., 2001 Sess. (Haw. 2001), limiting county liability for personal injuries or death resulting from hazardous recreational activities; H.R. 1524, 21st Leg., 2001 Sess. (Haw. 2001),

familiar assertion that "in recent years, the number of punitive damages claims asserted have increased dramatically," H.B. 150 again proposed a formula of limiting punitive damages to three times compensatory damages, allowing only the judge to determine the amount, and requiring one-third be paid to the State.[416] With the identical prefatory statement alleging claims had increased, S.B. 572 took a similar approach by limiting punitive damages to three times compensatory damages, but requiring 100% of any award to be turned over to the State.[417] H.B. 1029 echoed pending congressional legislation[418] and took a more comprehensive approach, seeking to: 1) limit punitive damages only to cases where a compensatory award was made; 2) require courts to use a clear and convincing standard; 3) allow punitive damages only for reckless or intentional torts; 4) require only the judge to determine the amount, based on four guidelines: reasonable relationship to the harm, reprehensibility, profit from the conduct, and defendant's financial condition; 5) limit the amount of recovery to $250,000 or the compensatory amount, whichever is greater; and 6) only award punitive damages that duplicate awards in other cases if new and substantial evidence justifies an additional award.[419] These proposals, too, failed.

In the 2002 session, the legislature considered but did not pass several new tort reform bills, ignoring punitive damages altogether.[420]

The Legislature's 2003 session was similarly uneventful for tort reform, despite a historic shift in state politics. Although the Democrats still controlled both the House and Senate, for the first time in 60 years, Hawaii elected a Republican Governor, former Maui Mayor Linda Lingle, who ran on a business-friendly "new beginning" platform.[421] A recycled set of bills that would limit punitive damages was introduced, but fared no better.[422]

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limiting state and county liability for use of beaches and hiking trails.

[416] H.R. 150, 21st Leg., 2001 Sess. (Haw. 2001).

[417] S. 572, 21st Leg., 2001 Sess. (Haw. 2001).

[418] *See supra* note 8.

[419] H.R. 1029, 21st Leg., 2001 Sess. (Haw. 2001).

[420] H.R. 2201, 21st Leg., 2002 Sess. (Haw. 2002) would have required payment of any tort awards based on a defendant's criminal act to go to either the victim or to the State's victim compensation fund; S. 2700, 21st Leg., 2002 Sess. (Haw. 2002) would have capped all general damage awards against the State at $500,000; and S. 2016, 21st Leg., 2002 Sess. (Haw. 2002) would have enacted immunity for schools from school ground accidents. The legislature passed only the county lifeguard immunity bill originally considered in 2000 (Act 170, S. 796, 21st Leg., 2002 Sess. (Haw. 2002)).

[421] Richard Borreca, *The Leader of the State*, HONOLULU STAR-BULLETIN, Dec. 2, 2002 (Special Inauguration Pullout) *available at* http://starbulletin.com/2002/12/02/news/story13.html (last accessed June 20, 2004); *Government Alone Can't Do the Job*, PAC. BUS. NEWS (Nov. 11, 2002), *available at* www.bizjournals.com/pacific/stories/2002/11/11/editorial1.html (last accessed June 20, 2004) (noting Lingle's "widespread business support" and agenda for economic development).

[422] *See, e.g.*, H.R. 971, 22d Leg. (Haw. 2003) (limiting punitive damages as part of an overall cap on

In addition to its longevity, a distinguishing feature of the legislative debate about punitive damages reform in Hawaii is that the rhetoric remains unchanged. For example, in S.B. 328, introduced in 2003, the sponsors again repeated their mantra that punitive damages in Hawaii were out of control: "The legislature finds that in recent years the number of punitive damages claims asserted have increased dramatically."[423] The unchanging legislative polemic and the evident frustration among all of the political players demonstrates the pressing need for closer review of empirical information on punitive damages verdicts in Hawaii, which should provide a sounder context for future legislative consideration of any reform proposals.

In summary, the legislature's perception of the state of affairs of punitive damages, as expressed in the continuous stream of tort reform proposals since 1986, reflects several core legislative (and popular) beliefs, which are examined in this empirical study: 1) "punitive damages are increasing dramatically in recent years," in frequency and amount; 2) they are handicapping Hawaii businesses (which assumes they are excessively imposed on this type of defendant); and 3) they are routinely requested and allowed in ordinary negligence cases. In addition, the various legislative bills suggest some key reform proposals that can be examined in light of the empirical data: 1) a ratio cap on punitive damages of either two times or three times the compensatory award; 2) a flat cap of $250,000; 3) an allocation of part or all of the awards to a state fund; 4) an elimination of the jury's role in awarding punitive damages; and 5) an allowance of punitive damages only in "reckless or intentional tort" cases. These hypotheses and reform proposals are discussed below as reference points for analyzing the data in Part IV.

IV. THE EMPIRICAL CONTEXT: A QUANTITATIVE ANALYSIS OF HAWAII PUNITIVE DAMAGES JUDGMENTS, 1985–2001

This Part examines the quantitative data derived from seventeen years of experience in Hawaii with punitive damages judgments in three judicial systems: the State courts, the State Court-Annexed Arbitration Program ("CAAP"), and the Federal District Court for the District of Hawaii. Viewing the total of sixty-three punitive damages judgments in this period in the

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damages in employment discrimination cases); S. 421, 22d Leg. (Haw. 2003) (imposing a variety of limitations on punitive damages for medical torts); S. 407, 22d Leg. (Haw. 2003) (capping punitive damages at $375,000); S. 328, 22d Leg. (Haw. 2003) (capping punitive damages at three times the compensatory award and allocating all such awards to the State).

[423] *Compare* S.B. 328, Part IV, § 10, 22d Leg., 2003 Sess. (Haw. 2003) *with* H.R. 2544, § 17, 19th Leg., § 17, 1998 Sess. (Haw. 1998).

context of the 2,250 total tort judgments reported provides rich data for examining some of the concerns expressed by proponents of tort reform; these concerns include the alleged excess in the frequency of requests for, and awards of, punitive damages. It also allows an analysis of the potential effectiveness of various reform proposals, including caps on awards and allocation (state fund) proposals, and the relative role of the different types of fact-finders.[424] Overall, the data indicate that some of the most commonly held beliefs about punitive damages awards in Hawaii—and the rhetoric driving the constant pressure on the State Legislature to "do something" about punitive damages—are incorrect or exaggerated. The data also indicate that some of the most popular reform proposals, such as a multiplier cap and the elimination of the jury's role in determining awards, may have little practical effect on the Hawaii punitive damages system. Although there may be other justifications for reform, such as public policy or political advantage with the business sector, the rhetoric and the reality appear to be far apart on many of the key issues in the punitive damages polemic in Hawaii.

A. The Importance of Being Empirical

In his insightful 1999 *Pepperdine Law Review* article, "The Importance of Being Empirical," Professor Michael Heise discusses the value of, and impediments to, quality empirical legal scholarship.[425] Joining the ranks of diverse legal scholars such as Richard Posner, Derek Bok, Peter Schuck, and Lawrence Friedman,[426] Heise argues that "too little legal scholarship is empirical,"[427] even though the demand for empirical scholarship is strong.[428] He notes that some commentators believe that "an increase in empirical legal

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[424] This Part uses quantitative data to examine most of the common legislative beliefs and proposals for reform mentioned at the end of Part III, *supra*. Other claims, such as that punitive damages handicap Hawaii businesses and therefore should be allowed only in "reckless or intentional tort" cases, are not subject to quantitative analysis, and are therefore examined in Part V, the qualitative analysis of the reported judgments.

[425] Heise, *supra* note 3. Heise defines empirical legal scholarship as scholarship that "uses statistical techniques and analyses, [ ] studies that employ data (including systematically coded judicial opinions) that facilitate descriptions of or inferences to a larger sample or population as well as replication by other scholars." *Id.* at 810.

[426] *Id.* at 811 n.16 (citing Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 324 (1989), and noting proponents of the "long and distinguished pedigree" of empirical scholarship, including Justice Holmes, Roscoe Pound, Charles Clark, William O. Douglas, and Underhill Moore).

[427] Heise, *supra* note 3, at 812.

[428] *Id.* (citing Craig A. Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 362 tbl.1 (1995)). For a broad discussion of the role of research in legal scholarship, see STUART S. NAGEL & LISA A. BIEVENUE, SOCIAL SCIENCE, LAW, AND PUBLIC POLICY (University Press of America 1992).

scholarship will help ease the growing rift separating legal scholarship from the legal profession,"[429] and that "[t]he legal academy, if it was so inclined, could become even more relevant to the judiciary and Bar by producing more empirical research."[430] Rather than detracting from theoretical scholarship, a more solid empirical foundation would enhance "legal theory's persuasiveness and influence."[431]

Yet, there are numerous obstacles to empirical scholarship in the legal academy, including that "the prospect of external empirical checks on one's work fuels a certain level of humility that is sometimes absent in non-empirical work."[432] Heise concludes, nonetheless, that "[o]ur legal literature would be enriched if more academics, particularly law professors, became more engaged in empirical legal research and produced more of it."[433]

Heise's observations are particularly intriguing in the context of the current debate over punitive damages. Given the breadth, diversity, and depth of the empirical scholarship that has been produced in this area of tort law, one might wonder why there there still seems to be such a large gap between the academy and the popular debate. One answer is not to avoid the traditional quantitative approaches of empirical scholarship but rather to make them more relevant by enrichening them with complementary non-quantitative techniques.

B. Methodology

The trends in empirical legal scholarship divide into three distinct categories: judicial opinion coding or case content analysis,[434] descriptive,[435]

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[429] Heise, *supra* note 3, at 813. He also suggests that empirical legal scholarship can "shore up" the "intellectual stature and reputation" of the legal academy "among the broader community of [interdisciplinary] scholars." *Id.* at 815.

[430] *Id.* at 813.

[431] *Id.*

[432] *Id.* at 818. Heise notes that the "incentive structure" for law professors is "largely skewed against empirical research and thereby disinclines rational law professors from pursuing it." *Id.* at 815-16. Institutional obstacles include: the need for access to specialized data, computer systems, and software; that law libraries do not cater to this type of research; and other "structural barriers," *id.* at 816; lack of training in empirical methods, *id.* at 817; the norms of legal scholarship that do not encourage collaboration, *id.*; physical isolation, *id.* at 817-18; relative lack of prestige of empirical work compared to theory, *id.* at 819-20; the lack of internal institutional incentives, *id.* at 820-21; the peculiar uncertainty of empirical work ("[r]esearchers frequently do not know what the data might say until after the data have been gathered, coded, and analyzed"), *id.* at 821; and lack of external institutional incentives, *id.* at 822.

[433] *Id.* at 834. Heise's own substantial contributions to empirical legal scholarship are noted in his article, *id.* at 811 n.16.

[434] *Id.* at 825 (noting the limitations on the usefulness of coding reported judicial decisions, which represent "a narrow slice of our judicial system that may or may not closely resemble the entire legal universe").

[435] Heise includes here empirical work that includes "means, medians, modes, rates, proportions, and

and inferential.[436] This study uses the first two approaches, sorting verdicts into analytical categories and working with a universe rather than a sample of judgments. Because the entire population of data, rather than merely a subset, is available, a descriptive rather than an inferential approach is appropriate.[437] To guard against over-interpretation, this study primarily uses relatively straightforward descriptive indicators such as means, medians, and frequencies, rather than the more complex social science research methods suited for large sets of randomly sampled data.[438]

1. The Universe of Data: Personal Injury Judgments Hawaii Reporter

The database for this study consisted of a total of 2,250 personal injury judgments reported over a seventeen-year period in Neal Seamon's *Personal Injury Judgments Hawaii* ("*PIJH*").[439] *PIJH* contains all final judgments in personal injury and related tort actions filed in the state circuit court and the U.S. District Court for the District of Hawaii, except for class action cases, asbestos, and toxic tort cases.[440]

Beginning in 1987, when Hawaii adopted the mandatory Court-Annexed

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frequency counts," which both "possess intrinsic value for the information" conveyed and are also "beneficial" because they "contribute to an empirical foundation upon which further, frequently even more sophisticated, empirical work can build." *Id.* at 826-27. *See also* NOREEN L. CHANNELS, SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS 1, 182 (Rownan & Allanheld 1985) ("Descriptive statistics are used to (1) assess the data for their adequacy and potential usefulness, (2) present information about the data in a manner that is substantially better than anecdotes or general impressions, and (3) lay the groundwork for comparisons, inferences and hypothesis testing.").

[436] Heise, *supra* note 3, at 827-28. Inferential empirical scholarship includes "studies that use statistics inferentially," that is, advance generalizations based on a sample of cases or population of subjects. *Id.* With appropriate methodology (particularly a random, non-biased sample), this approach can be powerful. *Id.* at 827-28 n.132 (citing Eisenberg's punitive damages study, *Predictability, supra* note 44).

[437] CHANNELS, *supra* note 435, at 183.

[438] For a classic text on the wide variety of social science research methodologies, see H. RUSSELL BERNARD, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES (Sage Publications 2000).

[439] *Personal Injury Judgments Hawaii* ("*PIJH*") is a member of the National Association of State Jury Verdict Publishers ("NASJVP"). *See Jury Verdict Summaries, available at* http://www.juryverdicts.com (last accessed June 20, 2004). NASJVP is a national organization of thirty-four publishers of jury verdict summaries. The publishers collect detailed information directly from the attorneys who tried the cases, write concise summaries, and publish them in periodic reports. *Id.* In Hawaii, the reporter system is primarily used by tort law attorneys and insurers for case evaluation. *PIJH* began reporting verdicts in 1969, *Personal Injury Judgments Hawaii, at* http://www.juryverdicts.com/999973/about.html (last accessed June 20, 2004), but did not start a regular published service until in 1985. Interview by Tracy Fujimoto with Neil Seamon, Editor, *PIJH*, Honolulu, Hawaii (July 21, 1999). *PIJH* Editor Neal Seamon is a licensed independent insurance adjustor and former law office manager. *Personal Injury Judgments Hawaii, available at* http://www.juryverdicts.com/999973/about.html (last visited Apr. 17, 2004) (last accessed June 20, 2004).

[440] *PIJH* Instructions (on file with author).

Arbitration Program ("CAAP") for tort cases valued at $150,000 or less,[441] *PIJH* also began reporting the results from CAAP arbitrations when awards were filed as final judgments with, or appealed to, the circuit court.[442] The scope of cases included in *PIJH* generally is extensive: negligence, premises liability, product liability, strict liability, false arrest/false imprisonment, defamation (libel and slander), invasion of privacy, negligent/intentional infliction of emotional distress, animal owner's liability, innkeeper's liability, wrongful termination, constructive discharge, discrimination, malicious prosecution, malpractice, wrongful death and birth, wave action, golf carts, slip and fall, government and municipal liability, and Federal Tort Claims Act cases are all included.[443] Types of cases not included in *PIJH* include property damage cases[444] (unless there is a related personal injury claim), and some business damage cases. As a result, the study may over-emphasize personal injury cases compared to the business dispute context in which punitive damages are also often sought by one business against another. For each reported judgment, *PIJH* includes a variety of information.[445] Information about the results of any appeals is not routinely included in the verdict sheets; thus, the judgments reported are final as to the trial court, but may not have withstood appeal.[446] If a case is appealed and remanded, however, *PIJH* includes the results of the remanded trial, if any, and

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[441] *See supra* Part III B (discussing CAAP program). The State Judiciary initiated CAAP in 1986 and the Legislature adopted it statewide effective in 1987. *Id.*

[442] Interview with Neil Seamon, *supra* note 439.

[443] *Personal Injury Judgments Hawaii, available at* http://www.juryverdicts.com/999973/sub.html.

[444] *See, e.g., Kawamata Farms* case, discussed *supra* note 78 (involving $14 million punitive damages award for crop damage from defective Dupont product).

[445] The information includes: court; civil number; judge/arbitrator; jury or jury-waived; date of judgment; caption; narrative description of the causes of action and summary of the case; the attorneys representing the plaintiff(s) and defendant(s); date of filing of the complaint; plaintiff's prayer; plaintiff's age, sex, occupation, and marital status; description of alleged injuries; whether the spouse or dependents claimed loss of consortium; breakdown of special damages request; plaintiff's last demand; defendant's last offer; plaintiff's and defendant's experts; number of trial days and whether the trial was bifurcated; award of prejudgment interest; filing of offer of judgment; the verdict/judgment by jury and/or judge, including a breakdown of general, special, and punitive damages; and, post-verdict motions and results. *See* Appendix A for sample verdict sheet.

[446] Because appellate cases are generally reported by the Hawaii Supreme Court and the Intermediate Court of Appeals, *see supra* Part II, discussing Hawaii case law on punitive damages awards, the reporters tend to pick up the largest and more important trial court judgments that are appealed. For example, the only two reported products liability awards in the study, *Masaki* and *Tabieros*, as well as the only major medical malpractice award, *Ditto*, were all addressed extensively by the Hawaii appellate courts and ultimately all three large awards were reversed and remanded. *Masaki*, 780 P.2d at 566 (reversing and remanding punitive damages award); Tabieros v. Diaz, 827 P.2d 1148 (Haw. 1992) (reversing trial court's directed verdict for Clark on punitive damages); Tabieros v. Clark, 944 P.2d at 1279 (reversing retrial and ordering third trial of judgment against Clark); Ditto v. McCurdy, 947 P.2d at 959-61 (Haw. 1997) (vacating and remanding punitive damages award); Ditto v. McCurdy, 44 P.3d 274, 275 (Haw. 2002) (vacating and remanding retrial of punitive damages award).

references the earlier (or later) related case.

Using a verdict reporter system to generate a reliable data set is both immensely valuable and fraught with challenges.[447] It is important, therefore, to understand how the reporter obtains its information. *PIJH*'s sole editor and publisher, Neal Seamon, personally reviews the judgment books in the U.S. District Court and the State Circuit Courts each month.[448] Seamon also attempts to interview the attorneys involved with the cases. Subscribers to *PIJH* are predominantly the defense and plaintiffs' bars and insurance companies in Hawaii,[449] suggesting that *PIJH* is viewed as a reliable, neutral source of information.

2. Coding

This study used seven steps in preparing the data for the quantitative analysis presented in this Part. First, all loose-leaf volumes of *PIJH* from 1985 to 2001 were hand-checked for completeness and accuracy.[450] Second, all judgment sheets were coded by decision-maker: state circuit court, federal district court, or (post-1986) CAAP. Third, judgment sheets were then coded by prevailing party: judgment for plaintiff or judgment for defendant. This coding was not perfect; in a handful of cases, both parties prevailed on some issues (*e.g.*, defendant prevailed on a counterclaim) or the court overturned the jury verdict; in such cases, the judge's judgment rather than the jury verdict was coded. Fourth, the verdict sheets were then examined for whether the plaintiff made a request for punitive damages. Only in a few cases in

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[447] In one recent study, however, a verdict reporter maintained by single individual for Franklin County, Ohio, was found to be more comprehensive and less biased than a computerized LEXIS database of jury verdicts. Merritt & Barry, *supra* note 47, at 323-25. The authors further suggest the "reliability of the commercial [verdict] reporting services is not improving with time; on the contrary, it may be declining." *Id.* at 326; *see also id.* at 326 n.47 (noting that numerous other authors have "questioned the reliability of commercial verdict reporters"). They found a bias toward the plaintiffs in verdicts reported by the commercial services. *Id.* at 325. Ultimately, they rejected use of the computerized database other than for double-checking the individual's reporter system. *Id.* at 326.

[448] According to Seamon, Hawaii's Third Circuit does not maintain a judgment book, so subscribers are asked to report judgments directly to him. He obtains the CAAP information directly from the CAAP program. Interview with Seamon, *supra* note 439.

[449] *Id.*

[450] Because *PIJH* is issued as a loose-leaf monthly, there are a number of challenges in ensuring a comprehensive set of data, including correcting the problems created by: 1) dates of judgment that did not correspond to the dates of the bi-annual volumes (because of lag time in writing and publishing each judgment sheet); 2) revised judgment sheets issued in subsequent volumes; 3) judgment sheets from two different sets of volumes revealed numerous discrepancies from filing errors; and 4) a small number of miscellaneous errors found in the information on the judgment sheets. Nonetheless, the author wishes to emphasize that *PIJH* provided an impressively comprehensive and accurate set of data. Particularly given that the service is a one-man labor of love that necessarily involves the challenges of interviewing busy court administrators and reluctant or difficult-to-reach lawyers, the author sincerely appreciates Neal Seamon's heroic efforts in publishing this invaluable reporter.

which punitive damages were awarded did the verdict sheets not indicate a request for punitive damages; these were coded as requests based on the assumption that the verdict sheet erred or that a request was made at some later point in the case. Fifth, for those verdicts in which a request for punitive damages was made, the cases in which punitive damages were awarded were isolated. Sixth, for those verdicts that included punitive damages, the award was coded for at least three factors: 1) the size of the punitive damages award; 2) the size of the punitive damages award compared to the compensatory award; and 3) the ratio of the compensatory award to the punitive damages award. Seventh, for each year of the study, the following issues were analyzed for all judgments reported that year: 1) the total dollar amount of the awards; 2) the mean of all awards; and 3) the median of all awards.

3. Charting

After coding the judgment sheets, a series of charts was prepared to probe whether the specific claims often made by proponents of tort reform in Hawaii were supported by the data. One goal of the study was to make the presentation of data transparent and readily verifiable. Accordingly, raw and summary data are presented as clearly as possible in the charts. The back-up data are accessible through the author's web site, and *PIJH* may be obtained by contacting the author, the University of Hawaii Law School Library, or the Hawaii Supreme Court law library.

4. Limitations of the Data

All data sets have inherent limitations for purposes of interpretation. For the *PIJH* reports, perhaps the two most notable limitations are the lack of reports before 1985 and the exclusion of certain categories of tort cases that are often significant in a punitive damages study (*e.g.*, non-personal injury cases, such as property damage, business-to-business torts, and class actions such as asbestos and toxic tort cases). Less important limitations of the data include the potential error rate associated with any reporter system that relies on elbow grease rather than a computerized tracking system.[451] None of these limitations is unique to Hawaii or significant. Even short of perfection, the factually rich data set of 2,250 personal injury judgments provides a significant wealth of consistently and neutrally collected data to support

[451] *But see* Merritt & Barry, *supra* note 47, at 323-24 (discussing the view of some researchers that the hand-created verdict reporters are significantly more accurate and complete than the computer databases now available).

useful analysis and, in some ways, may be more comprehensive than data yet presented for other states.

The relatively small number of tort cases and punitive damages judgments in Hawaii compared to other states is not considered a limitation of the data. Because the study presents the universe of data and not a sample or subset, there is no risk that it is not representative. The relatively small number of punitive damages judgments does mean, however, that predicting future trends in Hawaii is very tricky business. For that reason, this study focuses on the information provided by existing data and their relationship to each other. Where relevant, trendlines using regression analysis were applied to the data, even though the R^2 was usually too low to provide any predictive confidence. The trends data is, at best, only suggestive.

Another inherent limitation of longitudinal empirical work is that the researcher is always running to catch up with current data, making such studies extremely time intensive and, frustratingly, never complete.[452] Thus, although the likelihood of a substantial investment by state judiciaries in the collection of more rapidly accessible data is low, this study nevertheless joins others in calling for "an ongoing process of data collection and analysis."[453] Otherwise, the data will always inherently lag behind the debate.

Two other limitations are important to mention, although they are limits to the analysis and not the data per se. One is that these judgments are a "final snapshot" of trial results at the circuit court level and, unless the case is later remanded and fully retried, *PIJH* does not include the results of any appellate review. Because the study looks at judgments, not just verdicts or awards, the data do capture review of the jury awards by the trial court judge, such a remittitur. For punitive damages, however, appellate review often leads to substantial reductions in trial awards and, combined with problems of defaulting or recalcitrant defendants, and post-judgment settlements, this means that "plaintiffs rarely receive[] the amount awarded by the jury."[454] Thus, if anything, the trial court judgments data would tend to overestimate the actual imposition on, and pay-out by, defendants of punitive damages

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[452] Eaton et al., *supra* note 47, at 691-92 (Eaton explained after concluding his first study of Georgia tort verdicts: "Studies such as ours, and even the more ambitious studies conducted by Rand, the BJS, and the NCSC, cannot provide all the needed information. These studies are after the fact, time consuming, expensive to conduct, and have an inherently short useful life. Policymakers in 1997 will ask 'what is happening now,' not 'what happened in 1993.'").

[453] *Id.*

[454] Robbennolt, *supra* note 56, at 165 & nn. 287-92 (sources cited therein). Peterson, Sarma, and Shanley found that punitive damages awards were reduced post-trial in approximately one-half of the cases examined and that, overall, defendants ultimately paid approximately 50% of the total damages that were awarded. Moreover, they found reductions were more likely in cases with higher total awards, higher punitive damages, and higher punitive to compensatory damages ratios. *Id.* at 165-66.

awards.

It is particularly important to remember that reported judgments from cases that *reached trial* are a small subset (about 2.7%) of the total number of tort cases filed each year and may not be representative of all filed tort cases.[455] Final judgments also do not reflect either party's pre-judgment victory on important legal or factual issues. The infamous "shadow effect" of punitive damages, that is, the impact of the potential of an award on the pre-trial (and even pre-filing) settlement process, perceived to have a disproportionately threatening impact on defendants by some tort reform advocates,[456] also cannot be discerned from this data. By not examining the shadow effect, this study may underestimate the real-world impact on defendants of the punitive damages awards that are reported.

C. Quantitative Analysis

The national empirical studies of punitive damages awards have primarily examined the frequency and size of punitive damages awards, and sometimes also the ratio of such awards to the compensatory awards. To the extent possible, comparison of the Hawaii data to these national studies is presented below, but because studies often vary in the way they present their data (*e.g.*, the "rate" of punitive damages award can be among all tort cases filed, among all tort verdicts, among all tort verdicts in which plaintiffs requested punitive damages, among all tort verdicts in which plaintiffs prevailed, or among all tort verdicts in certain categories), straightforward comparisons are not always possible.

1. Skyrocketing Numbers? Frequency of Punitive Damages Judgments Compared to All Tort Judgments

Perhaps the most commonly heard criticism of punitive damages in Hawaii and across the United States is that the number of punitive damages awards is "skyrocketing."[457] The study therefore examined the frequency of such judgments over the seventeen-year period by comparing the number of punitive damages judgments to the total number of tort judgments reported in *PIJH* for the three fora: state circuit court, CAAP, and federal court.

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[455] *See infra* State Chart 15 (showing differential between annual tort filings and tort judgments) and Trends Chart 4 (showing types of dismissals of tort cases between 1983/84 and 1999/00: 80% by stipulation (settlement), 12.74% by notice, 4.4% by judges (motions), 1.76% by jury verdict, and .97% by nonjury verdict).

[456] Koenig, *Shadow Effect*, *supra* note 45.

[457] *See supra* Introduction (discussing the rhetoric of tort reform).

a. State Circuit Court Judgments

As indicated in State Chart 1, the annual number of tort judgments from 1985 to 2001 in the Hawaii State Circuit Courts has fluctuated from a high of 70 (in 1985, before the commencement of the diversionary CAAP system in 1986), to a low of 19 in the last year studied, 2001, with a total of 700, a mean of 41.18, and median of 37. The annual number of punitive damages judgments over the same period ranged from a high of eight (in 1988) to lows of zero (1989, 1991, 1994, 1995, and 2000), with a total of 39, an annual mean of 2.29, and an annual median of 2. The trend in the number of awards for the past seventeen years appears to be slightly downward (R^2=.349) (State Chart 1).

Translated into percentages (State Chart 2), the percentage of cases in which state courts entered punitive damages judgments compared to the cases in which courts entered torts judgments over the seventeen-year period fluctuated from a high of 21.62% in 1988 (8/37 judgments), to lows of 1989, 1991, 1994, 1995, and 2000.

The mean of the annual rates was 5.29%,[458] with a median of 5.26%. Thus, since 1985, Hawaii state courts have, on average, entered judgments including punitive damages awards in slightly more than 5% of the total tort judgments reported every year. The general trend over time appears to be distinctly downward (R^2= .127) (State Chart 2).

b. CAAP Awards

The State of Hawaii CAAP system became effective in early 1987,[459] and quickly had a significant impact on the tort caseload of the Hawaii Circuit Courts. As indicated in State Chart 1, the number of tort judgments in Hawaii state courts plummeted between 1985 and 1989 (the end of the second year of CAAP) from 70 to 26, a 63% drop. Conversely, as illustrated in CAAP Chart 1, the total number of CAAP awards reported in *PIJH* from 1987–2001 rapidly increased from the program's inception in 1987 with 28 cases to a high of 130 in 1995 (compared to a state court high that same year of 37, and the state court's all-time high of 70) to a low of 60 in 1999. The past three years of CAAP data indicate annual levels of awards comparable to the first

[458] The "mean of the annual rates" for the study data was calculated by summing the annual percentages and dividing by 17 years for State cases and 15 years for CAAP. The "overall mean rate" was calculated as the total value divided by the study period. For example, for State Chart 2, the mean annual rate is 5.29%, but the overall mean rate is 5.57% (representing the total number of punitive damages judgments (39) divided by the 17-year total of tort judgments (700 cases)). In general, the former statistic is more informative and is, therefore, used, unless otherwise indicated.

[459] *See supra* note 309 (noting CAAP became effective in the First Circuit, which includes all of Honolulu, in February 1987).

three years of the program (for 1999–2001, the number of awards reported annually were 60, 71, and 76; for 1988–1990, the awards reported were 65, 80, and 62). Overall, a total of 1328 CAAP awards were reported for the period studied, an annual mean of 88.53[460] and a (fifteen-year) median of 98. The overall trend in CAAP awards is slightly upward over time (R^2=.071) (CAAP Chart 1).

The number of CAAP *punitive damages* awards over the same period ranged from an annual high of 3 to lows of 0 in four years (1987, 1990, 1993, and 1998), with a fifteen-year total of 17, an annual mean of 1.13, and an annual median of 1. The trend was slightly downward over time (R^2=.037) (CAAP Chart 1).

Translated into percentages (CAAP Chart 2), the percentage of awards in which non-judicial arbitrators included punitive damages compared to all CAAP awards over the fifteen-year period fluctuated from an annual high of 4.62% (1988), to annual lows of 0% in four years (1987, 1990, 1993, and 1998), with a mean annual rate of 1.30%, and an annual median of 1.02%. Thus, on average, CAAP arbitrators awarded punitive damages in slightly more than 1% of the cases each year since the program's inception in 1987. The frequency of awards, however, has been highly variable over time (R^2=.001) (CAAP Chart 2).

c. Federal Judgments

As indicated in Federal Chart 1, the total number of federal tort judgments reported in *PIJH* from 1985-2001 fluctuated wildly each year from a high of 24 (in 1993) to annual lows between 7 and 10 judgments in eight years with a total of 222, an annual mean of 13.06, and an annual median of 13. The overall trend is downward (R^2=.117), with consistently low numbers in recent years (Federal Chart 1). The number of *punitive damages* judgments in federal court over the seventeen-year ranged from an annual high of 3 in 1996, to lows of 0 in 12 years, with a seventeen-year total of 7, an annual mean of 0.41, and an annual median of 0. The trendline for punitive damages judgments was essentially flat (R^2=.029) (Federal Chart 1).

Translated into percentages (Federal Chart 2), the percentage of cases in which the federal court entered punitive damages judgments compared to cases in which the federal court reported any tort judgment over the seventeen-year period fluctuated from an annual high of 15.79% (in 1996), to

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[460] Because CAAP did not become mandatory until early 1987, *see supra* note 309, the handful of case reports from 1986 (when the program was only an experimental program of the state judiciary) were not considered. Thus, the CAAP study period is 15 years, two years shorter than the state court study period.

lows of 0% in twelve years, with a mean annual rate of 3.53%, and an annual median of 0%. Federal punitive damages judgments in Hawaii, at less than 4% per year, can be fairly characterized as infrequent. Although the trend appears to be slightly increasing, the data are highly variable (R^2=.059) (Federal Chart 2).

d. Summary: Skyrocketing Numbers or Puttering Along?

Hawaii's CAAP system now handles the vast bulk of tort cases filed in the state, entering an average of 89 awards each year, compared to an average of 41 tort judgments per year in the state courts, and 13 in the federal court. Yet, it is the state court system, not CAAP, that experiences the higher average number of annual punitive damages judgments. The state court annual mean is 2.29 judgments, almost twice the CAAP annual mean of 1.13, and more than five times that of the federal court annual mean of 0.41. Similarly, it is the state courts that award punitive damages at the highest annual rate among the three systems studied. The mean annual state court award rate was 5.29%. Next highest was the federal court, with a mean annual award rate of 3.53%. CAAP had the lowest mean rate of 1.30%.

The higher incidence of punitive damages judgments in the state court system, despite the significantly lower number of tort judgments, is likely attributable to the fact that CAAP is the "bottom feeder" in the torts caseload food chain. All cases with a probable value of more than $150,000 are, by design, left to the state court system, and those cases by definition involve higher damages and typically the most severe injuries, two key factors that can generate higher rates of punitive damages awards.

Viewing CAAP cases as an inherent part of the state court system, rather than separately, provides a perspective that may be more comparable to states that do not have a similar mandatory arbitration scheme. When CAAP cases are mixed back into the state court data, the punitive damages award rates of the Hawaii state courts including CAAP results in an overall total of 56 punitive damages judgments (out of 2,031 total tort judgments), an annual mean of 3.29, and an annual median of 3 (State/CAAP Chart 1). The combined data also indicate, not surprisingly, lower annual award rates, ranging from annual lows of .6% (in 1991 and 1994) to an annual high of 10.7% (1988), with a mean annual rate of 3.18% (State/CAAP Chart 2). This combined mean annual rate is much lower than the state-court only mean annual rate of 5.29%, and is also slightly lower than the federal court mean annual rate of 3.53%.

Overall, the data do not show a "skyrocketing" in the number of punitive damages judgments in Hawaii. Indeed, the opposite appears to be true: the

number of punitive damages judgments in Hawaii has remained very low, "puttering along" for nearly two decades and, in fact, the number of judgments has visibly declined since the mid-1980s. The data indicate that: 1) the total number of state court judgments each year (State Chart 1) is approximately only 2 (and only about 3 for CAAP); 2) the relative percentage of punitive damages judgments compared to all tort judgments in state court (State Chart 2), is only a little over 5%, but was highly variable, with no punitive damages judgments entered in 6 of the 17 years; 3) considering CAAP and state awards together lowers the State's mean annual judgment rate to just over 3%; 4) for the last 13 years of the study period (1989–2001), the number of state court judgments per year never exceeded 4; compared to the first four years of the study period (1985–1988), when the number of judgments always ranged between 5 and 8 per year (State Chart 1); and 5) in 5 of the past 13 years, the number of judgments was 0; considering even just the 8 years with judgments, the annual mean was a low 2.125 with an annual median of 2 (State Chart 1). The overall trend in the number of punitive damages judgments (state court and CAAP combined) is essentially flat (State/CAAP Chart 1), and the overall trend in the frequency is distinctly downward (R^2=.413) (State/CAAP Chart 2).

Even a tough critic of punitive damages would be hard pressed to find in the data any alarming indications of skyrocketing or even increasing numbers of awards. The historical state court high of 8 punitive damages judgments (an annual rate of 21.62%) was in 1988, over 12 years ago, and subsequent years reached a high of only half that amount (4 judgments in 1992, in a year with an unremarkable annual rate of 6.78%) (State Charts 1 & 2). The highest number of CAAP punitive damages awards in any year was 3 (1988 and 1992) and the highest historical rate was only 4.62% (in 1988, the same year as the historical high for state court awards), with no year above 3% since that time (CAAP Charts 1& 2).

Comparing the Hawaii results to national studies shows that Hawaii's mean annual rates of punitive damages judgments (CAAP at 1.30%, State/CAAP combined at 3.18%, the federal court at 3.53%, and state courts at 5.29%) fall well within the range of national rates, reinforcing the conclusion of many empirical scholars that, nationwide, punitive damages are less frequently awarded than commonly believed. A 1996 RAND Institute for Civil Justice study by Eric Moller found a frequency range of 1-7%.[461] In the landmark 1995 study by Stephen Daniels and Joanne Martin, punitive

[461] MOLLER, *supra* note 43, at 33 (comparing awards in fifteen counties in five states from the 1985-1989 and 1990-1994 time periods).

damages were awarded in 4.5% of civil cases.[462] A 1995 Bureau of Justice Statistics Report found a rate of 6%.[463] A study by Peterson, Sharma, and Shanley found juries awarded punitive damages in only 1-2% of personal injury cases.[464] Although each of these studies derives the frequency data in different ways, making direct comparisons difficult, the Hawaii rates appear unremarkable in comparison to, and well in line with, these national rates.

2. Routinely Requested? Requests for Punitive Damages Compared to the Total Number of Tort Judgments

Punitive damages reform bills, such as S.B. 328 introduced in the Hawaii Legislature in 2003, are commonly premised on the assertion that "in recent years the number of punitive damages *claims asserted* has increased dramatically."[465] Are tort reform proponents correct in their claim that plaintiffs, or more accurately plaintiffs' lawyers, "routinely," *i.e.* abusively, request punitive damages in tort cases? The Hawaii data indicate that punitive damages during the seventeen-year study period were requested in about 15% of all CAAP awards reported, 22.4% of all state tort judgments (state court and CAAP combined), 37% of all state court only judgments, and at the highest rate, 43%, in federal court cases.

a. State Circuit Court Judgments

The number of reported state court judgments in which plaintiffs requested punitive damages awards ranged from an annual high of 28 (in 1985, before CAAP) to a low of 5 (2001, the last year of the study), with a total for the seventeen-year period of 260, an annual mean of 15.29, and an annual median of 16. One striking trend in the data is the steady decrease in the number of judgments each year in which plaintiffs requested punitive damages awards, dropping from the annual high of 28 in 1985 to the annual low of 5 in 2001, with two earlier dips to 6 (1989) and 8 (1996). The overall trend is steadily downward (R^2=.612) (State Chart 1). This gradual decline parallels the general downward trend in overall tort judgments (R^2=.044) (State Chart 1). The relationship is not entirely parallel, however, with substantial deviation in 1991–1992, when tort judgments increased substantially but requests for punitive damages did not. In general, the decline over time in requests is less dramatic than the more noticeable decline in tort judgments for the past

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[462] Daniels & Martin, *supra* note 7, at 214.

[463] DEFRANCES, *supra* note 42, at 6 (analyzing civil verdicts from the 75 most populous counties in 1991-1992).

[464] Robbennolt, *supra* note 56, at 162.

[465] *See supra* note 424 and accompanying text.

seventeen years. State Chart 4 examines the overall frequency of plaintiffs' requests for punitive damages in light of the total number of state court tort judgments reported during the seventeen-year period covered in *PIJH*. Ranging from an annual high of 59.46% in 1988 to an annual low of 23.08% in 1989 (a precipitous 36% drop in a one-year period), the mean annual request rate was 37.14%, and the annual median was 37.04%. Thus, Hawaii plaintiffs requested punitive damages in a little more than one-third of all reported tort cases that went to judgment in Hawaii state courts each year. The overall trend in frequency appears to be distinctly downward over time (R^2=.223) (State Chart 4).

b. CAAP Awards

CAAP Chart 1 indicates that the number of reported CAAP awards in which plaintiffs requested punitive damages has averaged about 13 a year since 1987, with an annual high of 25 in 1997. The overall trend in the number of requests appears flat (R^2=.007). In contrast, the number of annual CAAP awards increased steadily since the program's inception (R^2= .071) (CAAP Chart 1), then steadily declined since a peak of 130 in 1995 until the latest low count of 76 in 2001. This divergence is reflected in the trendline in CAAP Chart 4, which shows that the overall frequency of requests has slowly declined over time (R^2=.0322). Specifically, CAAP Chart 4 indicates the annual frequency of plaintiffs' requests for punitive damages, ranging from an annual high of 29.23% to an annual low of 7.14%, with a mean annual request rate of 15.47%, and a median annual rate of 16.25%.

For the past two years, the annual request rate has hovered around 20%, rising from a dip of about 10% in 1998. Overall, the mean annual request rate for CAAP awards is about one out of seven cases. This is less than half the mean rate reported for the state circuit courts.

c. Federal Judgments

Federal Chart 1 indicates that the number of requests for punitive damages in reported federal court tort judgments since 1985 has fluctuated between 0 and 14 per year, with an annual mean of 5.65, and an annual median of 6. The overall trend in the number of requests, like for CAAP, seems flat (but R^2=.001) (Federal Chart 1). Over the same period, however, the overall trend in the number of federal tort judgments reported each year was downward (R^2=.117) (Federal Chart 1). Federal Chart 4 shows in detail the frequency of plaintiffs' requests for punitive damages in federal court. Ranging from a remarkable annual high of 87.50% in 1998, when punitive damages were requested in 7 of the 8 tort judgments reported, to an annual low of 0% the

year before, the mean annual request rate was 43.52%, with a median of 42.86%. In relative terms, there appears to be a gradual upward trend in the rate at which punitive damages are requested in federal court (Federal Chart 4), however, the data are highly variable and forecasting is not possible (R^2=.026).

d. Summary: Routinely Requested?

Of the three Hawaii systems, the federal court experienced the highest mean annual request rate for punitive damages—43.52%, slightly higher than the annual mean of 37.14% for state courts, and three times higher than the CAAP annual mean of 15.47%. In short, punitive damages claims are most often requested in the high-value federal court cases in Hawaii,[466] "often requested" (*i.e.* about one-third of the time) in Hawaii state courts, and not very often sought in the lower-value CAAP cases. Thus, characterizing the tendency to request punitives as either "routine" *or* as "exceptional" would exaggerate the data. The best overall characterization is that punitive damages are "moderately often" requested in Hawaii. Whether that is too often or not often enough is a subject for further policy debate.

The assertion in bills such as S.B. 328 that punitive damages claims are increasing "dramatically" is, however, flatly contradicted by the data. As State Chart 4 indicates, in the past five years, the annual state court request rate dropped steadily each year, from 44.12% in 1997 to only 26.32% in 2001. The spike of an annual 44.12% request rate in 1997 was, indeed, a dramatic increase from the prior year (1996, at 25.81%), but it was the only year since 1992 to have a rate over 40%; in contrast, during the first seven years of the study period (1985–1991), the annual rate exceeded 40% in every year except 1989. Thus, overall, the trend in the frequency of plaintiffs' requests for punitive damages based on this examination of judgments reported in state circuit courts is slightly downward over time (State Chart 4, R^2=.223), and certainly does not show a dramatic increase. On the other hand, the annual request rate in CAAP awards has about doubled in the past four years, from 9.62% in 1998 to 21.05% in 2001. Yet, the 2001 rate is lower than the rate in 1997, and the overall trend since 1987 is slightly downward as well (CAAP Chart 4, R^2=.032). The only jurisdiction with an upward trend is the federal courts (Federal Chart 4, R^2= .026), over which the state legislature has no direct authority. A fundamental premise of reform bills aimed at punitive damages in Hawaii – that such claims are dramatically increasing – appears, therefore, unfounded and quite misguided.

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[466] *See supra* Part IV C 2 (discussing request rates for federal judgments in the study).

3. *Meritorious Requests? Frequency of Plaintiffs' Requests for Punitive Damages Awards Compared to Punitive Damages Judgments*

Are plaintiffs making meritorious requests for punitive damages awards or, as critics assert, are they throwing in a punitive damages claim regardless of their chances of winning on the claim? By comparing the frequency of plaintiffs' requests for punitive damages to their rate of success on punitive damages claims, this criticism can be analyzed. The data indicate that, in state court, plaintiffs obtained punitive damages judgments about once in every seventh request; in CAAP, once in every twelfth request; and in federal court, once in every fourteenth request. Thus, assuming that this success rate reflects the underlying merit of the claim, plaintiffs' assertion of punitive damages claims in state court cases may be characterized as more often meritorious and less of a "shotgun" approach than in CAAP or federal court.

a. State Circuit Court Judgments

State Chart 1 indicates the number of punitive damages judgments each year compared to the number of plaintiffs' requests for such awards. State Chart 3 focuses on this "request success rate" by translating into percentages the annual number of punitive damages judgments compared to the number of times a request were made. The fluctuations in this success rate over the seventeen-year period are large and erratic, varying from an annual high success rate of 36.36% in 1988 (when 8 of 22 requests were successful) to lows of 0% in five years (1989, 1991, 1994, 1995, and 2000, years in which a total of 60 requests were made but *no* judgments were entered). The mean annual success rate over the study period was 13.65%, with an annual median success rate of 16%. Looking at the trend over time, the annual request success rate appears to be decreasing (R^2=.04), suggesting either that plaintiffs' attorneys are less able to predict which of their cases are "winners" for punitive damages awards (the pleading is more random) *or* that the triers of fact are simply becoming less inclined to make punitive damages awards in cases where the plaintiffs request them. The fact that plaintiffs' attorneys had *no* success in the five years noted above also suggests that the triers of fact are exercising a substantial amount of independent judgment when faced with a request for punitive damages. On the other hand, given the very low R^2, the trendline fit is poor, and this fluctuation could also be simply a result of the particular facts in the various cases.

b. CAAP Awards

The number of CAAP awards reported in which plaintiffs requested

punitive damages ranged from an annual high of 25 (1997), with a total for the fifteen-year period of 195, an annual mean of 13, and an annual median of 12 (CAAP Chart 1). Unlike the steady decline in the annual number of state court requests for punitive damages, the annual number of requests in CAAP cases appears relatively steady over time (R^2=.007).

CAAP Chart 3 portrays the "request success rate" of plaintiffs for punitive damages. As with the state courts (*see* State Chart 3), the fluctuations in the CAAP annual "success rate" over the study period are large and erratic, varying from a high annual success rate of 20% to lows of 0% in four of fifteen years. The mean and median annual success rates over the fifteen-year CAAP study period were about half that experienced in the state courts, with an annual mean of 8.39%, and an annual median of 7.14%. The lower success rate in CAAP could mean either that, in these lower value cases, plaintiffs' attorneys are being too aggressive in asserting punitive damages claims *or* that the CAAP arbitrators (local attorneys themselves) are much less willing to award punitive damages in these cases than circuit court juries or judges.

c. Federal Judgments

Federal Charts 1 and 3 present the parallel "request success rate" for the federal court in Hawaii. As discussed above (Part IV C 2 c), the number of requests for punitive damages in federal court has been highly erratic over time (Federal Chart 1). Similarly, the fluctuations in plaintiffs' annual punitive damages request success rate in federal court are large and erratic, varying from peak rates of 33.33% that book-end the study period in 1985 and 2001, to lows of 0% in 12 years out of 15 (Federal Chart 3). The mean annual success rate over the seventeen-year study period was 6.61%, with a median annual success rate of 0%. As with the highly fluctuating success rates in state court and CAAP, the erratic annual federal success rates (R^2=.01) can reflect either on the poor predictive ability of the plaintiffs' attorneys or the skepticism of the triers of fact.

d. Summary: Meritorious or Overly Aggressive Requests?

Are plaintiffs' attorneys, as critics claim, overly aggressive in requesting punitive damages or are they making some meritorious rational prediction of the likelihood of success of such claims? The data as to "request success rate" are highly erratic in all three systems studied and are subject to contrary interpretations. Plaintiffs' attorneys have tended to fare best in state court, with a mean annual request success rate of 13.65%, compared to 8.39% in CAAP, and 6.61% in federal court. Put another way, in state court, viewing

the pool of tort cases that eventually went to judgment, plaintiffs obtained punitive damages judgments in about 1 of 7 cases where a request was made; in CAAP, plaintiffs succeeded in about 1 of 12 such cases; and in federal court, in about 1 of 14 such cases.

In their study of reported tort verdicts in Florida, Vidmar and Rose found that the overall "frequency of punitive damages was strikingly low,"[467] but they also found that when such claims were "put to the jury," the plaintiffs had very high "success rates" ranging from a high of 100% in one year to a low of 81% in another, with a mean annual rate of 89.5%.[468] Unfortunately, these results cannot be readily compared to the Hawaii data because *PIJH* does not report whether punitive damages claims were "put to" the jury, only whether the request was initially made (in the complaint).[469] Thus, the mean Hawaii "success rate" of 13.65%, which is substantially (6.5 times) lower than that reported in Florida, may indicate that the requests of Hawaii plaintiffs were substantially less well targeted by plaintiff's counsel than those in Florida, that pleading requests often did not blossom into tried claims before the jury, or that Hawaii juries are simply much less inclined to award punitive damages than Florida juries.

4. A Lottery? Frequency of Winning Plaintiffs' Success in Securing Punitive Damages Judgments

In addition to understanding the relationship between punitive damages requests and success, it is also useful to examine punitive damages "success" in the restricted context of the pool of cases in which judgments were rendered for plaintiffs ("winning plaintiffs").[470] This approach refines the "request success rate" discussed in Part IV C 3 above by eliminating those cases in which plaintiffs made a request for punitive damages but never won their underlying case. The data indicate that the average annual winning plaintiffs' success rate on punitive damages was highest in state court (13%), with federal court about half that rate (6.36%), and a CAAP rate about 8 times lower (1.60%).

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[467] Vidmar & Rose, *supra* note 71, at 487.

[468] This mean annual rate was calculated based on Vidmar and Rose's Table 1.

[469] Vidmar and Rose derive the percentages from comparing the "number of cases" in which punitive damages claims were "put to the jury," *id.* at 492 (Column 1, Table 1), and the percentage of times that the jury returned a punitive award. *Id.* (Column 2, Table 1). The Hawaii study derived the percentage from comparing the number of cases in which punitive damages were requested (usually in the complaint but also otherwise communicated to the reporter when the parties were interviewed), and it is not known how many of these claims were "put to the jury" for trial or the number that fell by the wayside as the case was tried.

[470] *See* Vidmar & Rose, *supra* note 71, at 493 & n.17 (reporting only verdicts of *successful* plaintiffs).

a. State Circuit Court Judgments

State Chart 5 indicates a "winning plaintiffs' success rate" that compares the number of state court torts judgments in which punitive damages were entered to all state tort judgments in which plaintiffs prevailed. The winning plaintiffs' annual success rate ranged from a high of 57.14% (1988) to lows of 0.0% in five years (1989, 1991, 1994, and 2000), with a mean annual rate of 12.19%, and a media annual rate of 6.25%. Overall, the data fluctuated often, but the trend over time was slightly downward (R^2=.126).

Looking at the entire seventeen-year period, 1988 truly stands out as an unusual year, the pinnacle of plaintiffs' success in securing punitive damages awards. In that year, punitive damages were awarded in 8 of the 14 cases (57%) in which plaintiffs prevailed. As further detailed in Part V, those cases involved: a violent high school fight ($4,000 punitive damages judgment—Case S19); a hit-and-run DUI (punitive damages judgment totalling $15,000—Case S15); a speeding DUI driver (punitive damages judgment totaling $3.00—Case S17); an admitted DUI accident (punitive damages of $25,000 awarded—Case S18); a medical professional defamation case (punitive damages judgment of $50,000 Case S20); an attorney malpractice case (punitive damages of $800,000 entered—Case 22); a second malpractice and fraud case against the same attorney (punitive damages of $250,00 judgment—Case S21); and the landmark *Masaki* case (punitive damages judgment of $11.25 million, later reversed by the Hawaii Supreme Court—Case S16). The following year, 1989, plaintiffs' success rate plummeted to 0% (0 of 8 cases), a low that reoccurred in 5 of the last 13 years covered in the study.

b. CAAP Awards

CAAP Chart 5 indicates a "winning plaintiffs' success rate" for CAAP, ranging from an annual high of 5.26% (also in the banner year 1988) to lows of 0.0% in four years (1987, 1990, 1993, and 1998), with a mean annual rate of 1.63%, and a median annual rate of 1.14%. The overall trend was downward over time (R^2=.019).

c. Federal Judgments

Federal Chart 5 indicates a "winning plaintiffs' success rate" ranging from an annual high of 33.33% (1996, 3 of 9 cases) to lows of 0% in 12 years, with an mean annual rate of 6.62%, and a median annual rate of 0%. The overall trend for this success rate appears to be upward (R^2=.077), but is highly erratic, reflecting the very low numbers of tort judgments and punitive

damages awards in federal court each year.

d. Summary: A Lottery?

Comparing the three different systems, the average annual plaintiffs' punitive damages success rate in cases where they were winners on the merits of their underlying claim was highest during the study period in state court (12.19%), with federal court rates about half that amount (6.62%), and CAAP rates about 8 times lower (1.63%). The comparison between state court and CAAP is particularly noteworthy. Winning plaintiffs in CAAP cases were considerably less likely to win punitive damages awards than winning plaintiffs in state tort cases. This may be a random event, a result of the state courts' hearing the higher-value tort cases, or an indication that CAAP attorney-arbitrators are more conservative than state court triers of fact. Compared to national studies, the mean annual success rate for the Hawaii state courts (12.19%) at first appears high. In the landmark 1995 study by Stephen Daniels and Joanne Martin, punitive damages were awarded in 8.3% of the verdicts in which the plaintiff prevailed.[471] The Bureau of Justice Statistics Report in 1995 found success rate of 6% in the cases in which the plaintiff prevailed.[472] The Hawaii rate is much more in line with these national rates, however, when CAAP awards are mixed back in the state pool. This aggregation of "all state tort judgments" results in a mean annual success rate of 5.49% and a median annual success rate of 2.83% (State/CAAP Chart 3), lower than both of the rates found in the national studies. In short, in Hawaii state tort cases where plaintiffs win a judgment, plaintiffs receive punitive damages in approximately 1 out of 18 of these successful cases. Calculating the average punitive damages "winning odds" for successful plaintiffs, however, is only one way of responding to the criticism that punitive damages are a "lottery." Both proponents and critics of punitive damages reform can argue that the odds favor their policy position, because the underlying issue is not the odds themselves but rather the link between the awards made and the merits of the awards, an issue further considered in Part V.

5. Grossly Excessive? The Amounts of Punitive Damages Judgments

Another common rallying cry of punitive damages critics is that the amounts awarded are grossly excessive. To examine this criticism, the Hawaii study reviewed the total amount of the awards over time as well as

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[471] DANIELS & MARTIN, *supra* note 7.

[472] DeFrances, *supra* note 42, at 8 tbl. 8.

other indicators of size. The overall mean award of punitive damages awarded was, surprisingly, about the same in federal court ($536,429) and state court ($552,457), when the reversed high-end *Masaki* judgment was included. When *Masaki* was not included, however, the overall mean was dramatically lower in state court ($270,943). CAAP awards averaged only about $21,780, 8% of the overall state non-*Masaki* mean, and 4% of the overall state mean including *Masaki*.

a. State Circuit Court Judgments

State Chart 6 shows the total amount of punitive damages awarded by state courts during the seventeen years of the study was $21,545,838, with an aberrational annual high of $12,394,003 (the year of the *Masaki* judgment) to the next largest high of $4,785,794 in 2001, and lows of $0 in five years (1989, 1991, 1994, 1995, and 2000), with a total of only $1 in 1998. Excluding the *Masaki* judgment (the outlier punitive damages verdict that was reversed on appeal by the Hawaii Supreme Court),[473] the total is cut about in half to $10,295,838. The overall mean award including *Masaki* was $552,457; the overall mean award excluding *Masaki* was $270,943; and the overall median (regardless of *Masaki*) was $88,500.

State Chart 7 plots the mean value annually. The annual mean award ranged from a high of $4,785,794 in 2001, far above the next highest annual mean of $1,529,20 (including *Masaki*) in 1988, or $163,429 (excluding *Masaki*), to lows of $0-$1 in six years (1989, 1991, 1994, 1995, 1998, and 2000). These means are based on small annual numbers of awards, with the dramatic high mean in 2001 resulting from *only one case*. That case, *Takaki v. Tavares*, involved a notorious arson conspiracy admittedly committed by the chief of Hawaii's leading movie production company against his competitors (*see* Appendix B, Case S39). Both the primary plaintiff and another of the defendant's competitors lost specially rigged trucks and trailers in the fire. The primary plaintiff claimed it ruined him financially, forcing him into bankruptcy. Further, he claimed that defendant had tried to hide his assets by laundering them through his (defendant's) parents. Ultimately, although the trial judge reduced the jury's award in other areas, the jury's award of $4,785,794 in punitive damages was confirmed. The *Takaki* punitive damages judgment was the second largest reported during the study period in state court (*Masaki* was $11.25 million), and only one other state judgment (*Parnar v. Americana Hotels*, $1.5 million) was over the one million mark.

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[473] *Masaki*, 780 P.2d 566, discussed *supra* notes 253-259 and 267-271.

Using the annual median value, Chart 8 indicates that the *Takaki* case resulted in a very high annual median of $4,785,794 in 2001, with the next highest median of $453,291 occurring in 1992 (four judgments), a median of $37,500 in 1988 (the year of the *Masaki* award), and lows of $0-$1 in six years. Calculated on this annual basis, the "overall mean of the medians" was $356,343.

b. CAAP Awards

CAAP Chart 6 shows that the total amount of punitive damage awards for the fifteen years of CAAP awards studied was $370,252, with an aberrational annual high of $250,000 (in 1992, a total of three awards). The next largest annual CAAP high of $32,000 occurred in 2000, with annual lows of $0 in four years (1987, 1990, 1993, and 1998). The overall mean punitive damages award was $21,779, with a median of $5,000.

CAAP Chart 7 plots the mean value annually. The annual mean award ranged from a high of $83,333 (in 1992), to lows of $0 in four years (1987, 1990, 1993, and 1998). The overall mean of the annual means was $12,890.

Using the annual median value, CAAP Chart 8 indicates a high median of $100,000 (in 1992), a low median of $0 in four years (1987, 1990, 1993, and 1998). Calculated on this annual basis, the overall mean median for the fifteen-year CAAP period was $13,977.

c. Federal Judgments

Federal Chart 6 shows a total amount of punitive damage awards for the federal courts for the study period of $3,755,000, with an annual high of $3,000,000 (in one case in 1990), dropping significantly to the next largest annual high of only $205,000 (in 2001, based on 3 cases), and annual lows of $0 in 12 years. The overall mean federal award was $536,429, and the median federal award was $0.

Federal Chart 7 plots the mean value annually. The annual mean punitive damages judgment in federal court ranged from a high of $3,000,000 (in 1990) to lows of $0 in twelve years, with an overall mean of the means of $212,843, and a median of $0.

Using the annual median value, Federal Chart 8 indicates a high median of $3,000,000 (in 1990), and a low median of $0 in twelve years. The overall "mean median" for the seventeen-year period was $212,647.

d. Summary: Grossly Excessive or Small Comfort?

The total amount of punitive damage judgments in Hawaii for the seventeen years of the study was just over $25 million: $21,545,838 in state

court (84% of the total); $3,755,000 in federal court (15%); and $370,252 in CAAP (1%). The overall mean award was about the same in state court ($552,457, including *Masaki*) and federal court ($536,429), with CAAP awards averaging about 4% of that mean ($21,780). The overall median values in each of the three systems were substantially lower than the means, suggesting a pattern of a large number of moderate awards and a smaller number of high awards.[474] For the entire period, the state court overall median was highest, at $88,500, followed by CAAP at $5,000, and the low federal median of $0. Examining the "overall mean medians" for all three systems, the state courts had the highest, at $356,343, next was the federal court at $212,647, and CAAP was last at $13,976.

In short, the state court system has awarded approximately $21.5 million in punitive damages judgments between 1985 and 2001, about 5.7 times the amount awarded in federal court, and about 58 times the amount awarded by the CAAP system. Average awards were about the same in state and federal court, but the average state court award was about 25 times larger than average CAAP award.

Are punitive damages awards in Hawaii "grossly excessive"? The quantitative data alone cannot answer this value-laden question. Only by reviewing the narratives (Part V below) can a judgment about "excessiveness" be determined by the reader. It also must be remembered that the $25 million in total awards does not mean that plaintiffs actually collected that amount. Indeed, actual collections probably were substantially lower. Yet, tort reform proponents also argue that, even if awards are never collected, punitive damage requests alone have a "shadow" impact on parties' settlement negotiations and pose an unfair threat to defendants. Moreover, proponents of state allocation schemes—whereby part or all of punitive damages awards are diverted into state or special public funds—can claim that this $25 million is a "windfall" to already compensated plaintiffs and is lost revenue to the state. Plaintiffs would, of course, argue that despite the public nature of the award, the judgment belongs to them, as victims and protagonists, not to the general fund.

A comparison to other studies provides some indication that the amounts of Hawaii awards are again within the national range. Studies conducted by the National Center for State Courts ("NCSC") found that "only 8% of all jury awards were greater than $1 million."[475] The Bureau of Justice Statistics

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[474] *See* Robbennolt, *supra* note 56, at 164.

[475] *Id.* (citing Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 237 (1996)).

("BJS") study found that "less than 25% of punitive damage awards were greater than $250,000 and less than 12% were greater than $1 million."[476] In the Hawaii study, only three of the 39 total state court punitive damages judgments (approximately 8%) exceeded $1 million,[477] exactly the same rate as found by the NCSC study and below the rate found in the BJS study.

Several studies have found that the median punitive damages award tends to be "relatively low," approximately $50,000.[478] Daniels and Martin found that "fifteen of the twenty counties with more than ten punitive damage awards for the period studied had median punitive damage awards below $40,000 and thirteen of the twenty counties had median awards below $30,000."[479]

Hawaii's median state court award amounts were generally higher than those found in other studies (State Chart 8 indicates that the annual median average was $356,343), but considering the much lower CAAP medians (CAAP Chart 8 shows an overall mean median of $13,976), the "state system" (state circuit court and CAAP combined) would be much lower and more in line with these national studies. While data alone cannot determine if the average Hawaii court punitive damages judgment of half a million is "grossly excessive" or "small comfort" to plaintiffs, the remarkably similar mean awards in state and federal court can be seen as one indication of regularity between the two parallel judicial systems. Moreover, the large differential between the means and much lower medians for the three systems suggests even less cause for alarm over the amounts being awarded.

Finally, while the average award may seem high to an outside observer, only 3 state punitive judgments in the seventeen-year study exceeded $1 million. Looking at the low end of the awards, 21% of the state punitive damages judgments did not exceed $5,000 (53% of CAAP awards); 38% did not exceed $20,000 (71% of CAAP awards); and 54% did not exceed $50,000 (88% of CAAP awards) (*see* Table 1 *infra*).

6. Irrational Amounts? Ratios of the Amounts of Punitive Damages Judgments Compared to the Compensatory Awards

Another common criticism of punitive damages judgments is that they

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[476] *Id.* (citing DeFrances, et al. *supra* note 42, at 6).

[477] *See* Table 12 *infra* (*Parnar*, $1.5 million; *Masaki*, $11.5 million; and *Takaki*, $4.8 million). None of the CAAP and only one of the federal punitive damages awards (*Mitchell*, $3 million) exceeded $1 million. *Id.*

[478] Robbennolt, *supra* note 56, at 163 (citing DeFrances et al, *supra* note 42, at 6; Ostrom, *supra* note 475, at 239, reporting a median of $38,000).

[479] Robbennolt, *supra* note 56, at 163 (citing Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 42 (1990)).

often grossly exceed the compensatory awards and lack proportionality to the injury.[480] A popular legislative proposal in Hawaii, other states, and in Congress, is to "cap" punitive damages awards at some ratio level, typically either 2:1 or 3:1.[481] This Part focuses on the impact these caps would have in Hawaii using past awards as a basis for comparison. The data indicate that a 3:1 cap would have affected the awards in 43% of the federal cases in which punitive damages were awarded, but in only 18% of the state court cases, and in only 6% of the CAAP cases. CAAP cases actually had the highest mean punitive-to-compensatory ratio for the period, 6.72, with federal courts averaging 2.7, and a much lower 0.90 for state court.

a. State Circuit Court Judgments

State Chart 9 presents the number of judgments over the seventeen-year study period where the punitive damages judgment in the 39 state court cases exceeded (by any amount) the compensatory damages award. As indicated, the annual "exceedance rate" fluctuated wildly, ranging from a high of 100% (in 1999, 2/2 cases, and 2002, 1/1 case), to 0% in seven years (1989, 1991, 1992, 1994, 1995, 1998, and 2000). The overall mean exceedence rate for the entire period was 46.15% (18/39 cases), the mean annual rate was 34.36%, and the median annual exceedence rate was 40%. In other words, the amount of punitive damages judgments in Hawaii state court cases exceeded the amount of compensatory damages in less than half of the cases, on average in only about 1 in 3 cases each year.

The ratio of the amount of punitive damage judgments compared to the amount of compensatory damage judgments is indicated in State Chart 10. The four highest ratios are 25.68:1 (*Lessary v. Lessary*); 19.32:1 (*Rodman v. Appell*); 17.24:1 (*Wilder v. Brown*), and 11.96:1 (*Takaki v. Tavares*). The facts of theses cases indicate the unusual context for these high ratios. In *Lessary* (Case S22), the jury awarded the victim of attorney malpractice an award of $181,000 in general damages and $800,000 in punitive damages. In that case, the defendant attorney Leonard Appell, a convicted felon who was the subject of a second punitive damages award in state court that same year (Case S21, discussed next), had attempted to coerce Mrs. Lessary into withdrawing charges against Mrs. Lessary's brother, the alleged rapist of Mrs.

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[480] The American Tort Reform Association (ATRA), a leading national proponent of tort reform, contends that "excessive punitive damages awards continue to be a major problem in many states," and supports a cap of two-times-compensatories or $250,000, whichever is greater. Am. Tort Reform Ass'n, *Punitive Damages Reform*, *available at* http://www.atra.org/show/7343 (last accessed June 20, 2004).

[481] *See* discussion of state legislative reform efforts, *supra* Part III; for the congressional proposal, see Introduction, *supra* note 8.

Lessary's minor daughter. Appell, who later filed for bankruptcy, also sent a defamatory letter to Mrs. Lessary's employer. In *Rodman* (Case S21), the same attorney, Leonard Appell, was sued for malpractice and other claims resulting from Appell's misuse of his client's retainer in the attorney trust account. In a verdict rendered five days before the *Lessary* verdict, the jury in *Rodman* awarded no general damages, but did award $12,943 in special damages, and $250,000 in punitive damages. The *Wilder* case (S37) involved a sexual harassment claim by a single woman against her employer, Paul Brown, a famous Honolulu hair stylist. Circuit Court Judge Kevin Chang reduced the jury award of punitive damages from $100,000 to $50,000, and left intact a compensatory award of $2,901. The *Takaki* case was the notorious film-industry arson case discussed earlier, where George Cambra admittedly burned and destroyed his competitor's trucks (*see supra* Part IV C 5 a).

The only other ratios greater than 3:1 were in three cases: 7.50 in *Vidmar v. Kan* (Case S24, domestic violence); 4.57 in *Sigler v. City & County of Honolulu* (Case S10, assault and battery by arresting police officers); and 3.38 in *Kim v. Nova Int'l Hawaii Co.* (S32, bar fight). The ratios are otherwise clustered heavily below 3:1. Of the 38 state punitive damages judgments considered (excluding the case of *Schmidt v. AOAO Marco Polo Condominium.* (S29), where no compensatory damages were awarded), only seven of the 38 exceeded the 3:1 ratio, leaving 31 (82%) *below* 3:1. Thus, a 3:1 cap would have affected the judgment in only seven of the 38 cases (18%). With *Schmidt* included (because a cap would also prohibit any award of punitive damages in cases where no compensatory damages were awarded), the cap would have affected 21% (8/39) of the cases. The overall mean ratio for the seventeen-year period was 1.11, well below 3:1; while the mean of the individual case ratios was 3.03;[482] and the median ratio was .98, substantially below 3:1.

Looking at the ratios more closely, State Chart 11 shows an enlarged scale and more clearly the impact of a 2:1 cap. A 2:1 cap would have affected punitive damages awards in 10 cases (11, including *Schmidt*, approximately 28% of the cases), only three more cases than the seven affected by the 3:1 cap (18% of the cases).

b. CAAP Awards

CAAP Chart 9 portrays the number of awards over the fifteen-year CAAP

[482] The overall mean ratio was calculated from the overall total punitive damages awards compared to the total amount of compensatory awards; the mean of the individual case ratios was calculated by summing the individual case ratios and dividing by 38. *See supra* note 458.

study period where the punitive damages award in the 17 cases exceeded (by any amount) the compensatory damages award. As with the comparable state court data, the "exceedance rate" showed substantial variation, ranging from a high of 100% in two years to lows of 0% in ten years. The overall mean exceedence rate for the entire period was 35.29%; the mean of the annual rates was 23.33%; and the median annual exceedance rate was 0%. These rates are much lower than those reported for state court.

The ratio of the amount of punitive damage awards compared to the amount of compensatory damage awards is indicated in CAAP Chart 10. The only ratio above four is the outlier *DeGuiar v. Logan* case (Case C2), a case involving a "missed punch" assault against a security guard, which like *Schmidt*, involved a judgment with no compensatory award but a small punitive award. Excluding this case, CAAP Chart 10 shows that the mean annual ratio is .894, with a median of .84, both substantially below both the 3:1 and the 2:1 cap ratios.

The only ratio over 3:1 in a CAAP case was 3.20 in *Doe v. Harrison Mew* (Case C14), which involved a punitive damages award of $32,000 and a compensatory award of $10,000. In *Doe*, the defendant, a businessman, lured a married woman, who had visited defendant's shop with her husband, into modeling for his jetski business and then sexually assaulted her. These data suggest that the most popular ratio cap proposals in Hawaii would have affected only two of the 17 reported CAAP awards (*Doe* and *DeGuiar*), about 12%, both of which primarily involved emotional injuries.

c. Federal Judgments

Federal Chart 9 portrays the number of federal judgments over the seventeen-year study period where the punitive damages award in the seven cases exceeded (by any amount) the compensatory damages award. As indicated, the annual "exceedance rate" for 16 of the 17 years (94% of the time) was 0%. The only year that showed a detectable ratio was 1996, when all three of the punitive damages verdicts reported exhibited exceedence. The overall mean exceedence rate for the entire period, however, was 57% (4/7); the mean annual rate was 11.76%; and the median annual exceedance rate was 0%.

The ratio of punitive to compensatory damages in each of the judgments is indicated in Federal Chart 10. The three highest ratios are 7.0 (*Pulse v. City & County of Honolulu,* F7), 5.0 (*Mano v. Hawaii Teamsters & Allied Workers Union, Local 996*, F5), and 4.1 (*Arceneaux v. Hotel Employees & Restaurant Employees, Local 5 Union*, F4). The facts of these three cases explain the unique context for these awards.

In *Pulse*, the plaintiff, a carpenter's apprentice who lived on a sailboat in Keehi Lagoon, was arrested for terroristic threatening and incarcerated for three years (*see infra* Appendix B). In his subsequent federal court action for malicious prosecution and false arrest, the jury found that he had been illegally convicted because the search that located his gun was illegal. The jury awarded him $350,000 in punitive damages and $50,000 in general damages. *Mano* involved a dispute between the plaintiff, a union senior business agent, and her employer, the union president. She claimed that the union president had wrongfully terminated her because she did not support his re-election bid. The jury found for plaintiff, awarding her $100,000 in punitive damages and $163,750 in compensatory damages. Finally, the third case, *Arceneaux*, included a punitive damages award of $60,000 and a $12,000 general damages award. The jury upheld the claims of the plaintiff, a female labor organizer, that her union employer had sexually harassed and wrongfully terminated her.

Four of the seven ratios (57%) fell below 3:1 and 2:1. Thus, a 3:1 or 2:1 cap would have affected the awards in three of the seven federal cases, or 43%. The mean of the ratios was .55; the overall mean ratio was 2.7; and the median ratio was 1.5.

d. Summary: Irrational or Proportional Awards?

Looking at all three systems, the mean annual exceedence rate for the entire period studied ranged from the highest of 34.36% in state court cases, to 23.33% in CAAP cases, and 11.76% in federal court cases (with overall means, respectively, of 46.15%; 57%; and 35.29%; and annual medians of 40%; 0%; and 0%). In terms of the ratio of punitive damages to compensatory damages, the state courts had the highest mean ratios (3.03, compared to .894 for CAAP, and .55 for the federal courts), but the federal court has the highest ratio when overall means were considered (2.7, compared to 1.11 for state court, and .043 for CAAP). Median ratios were again highest for federal court (1.5, compared to .98 for state court, and .84 for CAAP). A 3:1 cap would have affected the award in 43% of the federal cases in which punitive damages were awarded, 18% of the state court cases, and 12% of the CAAP cases. A 2:1 cap would have affected 28% of the state cases, 12% of the CAAP cases, and 43% of the federal cases.

In short, if adopted by the Hawaii State Legislature, a 3:1 cap would have affected about 1 in every 5 state court cases in which punitive damages were awarded and about 1 in 8 CAAP cases; a 2:1 cap would have limited recovery in about 1 in 4 state court cases and 1 in 8 CAAP cases. If adopted by Congress, a 3:1 or 2:1 cap could have a large impact on punitive damages

recovery in Hawaii federal court cases; about 1 in every 2-3 federal judgments in the study involved a punitives-to-compensatory ratio above these caps. Even though the effect in state courts and CAAP would have been in a minority of the cases, the cap would have limited the larger verdicts, which is perhaps the main goal of tort reform advocates.[483] However, a cap of any kind is a blunt instrument, tending to sweep within its prohibitions cases with no or low physical injury but high mental harm, or publicly injurious conduct that provokes a jury's strong condemnation of the defendant's conduct.[484] In retrospect, a cap would have reduced the punitive damages recovery of Hawaii plaintiffs in cases (described above) involving claims ranging from attorney fraud to assault and battery and sexual harassment, and from wrongful incarceration to wrongful termination.

The impact of one other kind of cap often proposed, a flat monetary limit (*e.g.*, $250,000), is worth analyzing as well. As indicated in Table 1, a flat $250,000 cap would have affected eight of the 39 state punitive damages judgments reported, or 21%; none of the CAAP cases; and 2 of the 7 federal cases (29%).[485] Of the eight affected state cases, the total reduction in punitive damages would have been $18,175,974. For the two federal cases, the reducation would have totaled $2,850,000. Thus, comparing the impact of the two most popular cap proposals, state court plaintiffs would have been about equally affected by the 3:1 and the $250,000 cap (in terms of the percentage of judgments affected); tort reformers, on the other hand, might prefer the 3:1 cap because it would also limit some of the punitive damages recoveries in the lower-value CAAP cases. In the federal context, the flat cap is the least painful overall for plaintiffs. In light of specific case results, of course, the preferences can reverse. For example, in the federal *Mitchell v. Physicians Health Plan of Minnesota* (F2) judgment, the 3:1 cap would have had no impact on the punitives award ($3 million) because the compensatory award was high ($9.2 million); whereas, the flat cap would have eliminated 92% of the punitives award. Thus, while the analysis does not answer the

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[483] National studies have similarly found that punitive damages tend to be closely related to the size of the compensatory damages award. *See* Eisenberg, *Predictability, supra* note 44; Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 50 (1992); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 1009 (1995).

[484] *See, e.g., Development of the Law: Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1534 (1997) ("Overall, statutory caps provide a certain and administratively easy solution to the perceived problem of excess in punitive damages awards, but they may prove to be too crude a reform measure, sacrificing flexibility and precision in the imposition of punishment and deterrence for the sake of greater control over the size of awards.").

[485] Table 1-11 are included at the end of this article, before Appendix A.

question of whether caps should be imposed, it does detail the specific impact that these popular proposals would have had on past judgments in Hawaii and reveal that the different proposals can have wildly different impacts on the same judgment, revealing the arbitrary nature of such proposals.

7. Are Juries "Out of Control"? Differences in Punitive Damages Judgments by Decisionmaker: Juries, Judges, and CAAP Arbitrators

Another common assertion of tort reformers is that overly sympathetic "runaway" juries are the driver of large and frequent punitive damages awards.[486] One popular proposal for reform of punitive damages, which has been often touted in Hawaii, is to take the decisionmaking out of the hands of juries and place it in under the control of judges, who are perceived to be more conservative and less prone to passion. The role of juries in awarding punitive damages is highly complex and this study does not attempt the type of behavioral analysis covered in major studies such as those by Eisenberg and Viscusi.[487] Nonetheless, the Hawaii data do indicate some interesting differences in decisionmaking tendencies of state court juries compared to state court judges, which can inform the debate. In light of the Hawaii CAAP system, comparisons can also be made to quasi-judicial CAAP arbitrators, and to a lesser extent, with federal juries and judges in Hawaii.

a. State Decisionmakers

State Chart 12 examines the allocation of the fifty-six state court and CAAP awards reported during the study period by decisionmaker: jury, judge, and CAAP arbitrator. Of the total number of awards, thirty-one were made by juries (an overall mean of 1.82 per year); eight were made by judges (jury-waived cases) (an overall mean of 0.47 per year); and seventeen were made by CAAP arbitrators (an overall mean of 1.13 per year).

The relative percentage of judgments by decisionmaker is examined in State Chart 13. Over the seventeen-year period, 55.36% of the state cases in which punitive damages were awarded were decided by juries, 30.36% by arbitrators, and 14.29% by judges.

State Chart 14 shows the total, mean, and median punitive damages judgments by state decisionmaker over the study period. Juries awarded a total of $21,198,838 or 96.73% of the total state amount awarded, with an

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[486] *See* Jeffry Jontz, *Business Community Troubled by Excessive Punitive Damage Awards*, ORLANDO BUS. J., Aug. 9, 1996, *available at* http://www.bizjournals.com/orlando/stories/1996/08/12/editorial2.html (last accessed June 20, 2004); *see also* Olson, *Myth*, *supra* note 32.

[487] *See supra* notes 44 & 51 and accompanying text.

overall mean award of $683,833, and an overall median award of $20,000. Judges awarded a total of $347,000, or 1.58% of the total amount awarded, with an overall mean award of $43,375, and an overall median of $15,000. CAAP arbitrators (assigned only cases valued at $150,000 or less) awarded a total of $370,252, or 1.69% of the total amount awarded, with an overall mean award of $21,780, and an overall median of $5,000.

A comparison of the means—$683,833 for juries, $43,375 for judges, and $21,780 for arbitrators—suggests that juries do award substantially higher punitive damage judgments than either judges or arbitrators. Using the mean, juries award amounts sixteen times higher on average than do judges, and about thirty-one times higher than arbitrators. Judges award amounts about two times greater than arbitrators. Comparing the medians—$20,000 for juries, $15,000 for judges, and $5,000 for arbitrators—brings the overall differences down dramatically, with juries awarding amounts only 1.3 times higher than judges and four times higher than arbitrators. Judges award amounts three times higher than arbitrators.

Most important, the substantially lower median than mean for jury awards compared to judge awards indicates that the bulk of jury awards are similar to the awards by judges but that a few high jury awards increased the mean much higher than the median. These statistics do not, however, account for the important differences in the types of cases that flow to each kind of decisionmaker.

In order to probe deeper into these numbers, it is helpful to examine the facts of the cases that were decided by judges and arbitrators, instead of by juries.[488] The eight cases decided by judges included: *Ofisa v. Navarette* (Case S3, brutal beating of woman by kick boxer; defendant proceeded pro se after his counsel withdrew and the judge held a one-day trial); *Caris v. Ludloff* (Case S4, a severe assault and battery case against a female TV executive; the judge held a two-day trial); *Sorrell v. Lynn* (Case S5, where a psychiatrist fraudulently advised a court about the plaintiff's mental status, resulting in the forcible eviction of plaintiff and her infant grandson; judge held a two-day trial); *Batangbacal v. Carlton Young* (Case S8, in which a police officer with a prior assault conviction broke plaintiff's nose over a parking space spat; judge held a three-day trial); *Cuson v. Agag* (Case S13, a DUI case where the defendant drove into crowd of high school students and then fled the scene; defendant defaulted; judge held one-day trial); *Uyeoka v. Kinkaid* (Case S18, a drunk driving accident with severe injuries to plaintiff; the defendant admitted liability at a one-day trial); *Santiago v. King* (Case S28, defendant

[488] *See* Appendix B, *infra*, for case narratives.

inmate stabbed plaintiff inmate in eye with a sharp pencil; judge held seven days of trial, finding both the State and defaulting defendant inmate liable, but entering punitive damages against the inmate only); and *Mohr v. Kaan* (Case S30, a defamation claim by one attorney against another; judge held a one-day trial).

Although there is no single common element to these cases, several do involve admissions of liability, defaulting, or pro se defendants (*Ofisa*, *Cuson*, *Uyeoka*), cases in which defendants may have been more willing to put their fate in the hands of a seasoned judge than an outraged community jury. All but one case involved relatively short trials. In four cases, both parties may have sought to avoid the adverse publicity of a jury trial (*Caris*, *Sorrell*, *Batangbacal*, and *Mohr*). Four cases involved assault or battery claims; two involved DUI defendants. None of these groupings fully explains, however, why judges' valuation of the punitive award would be substantially lower than a jury's assessment.

b. Federal Decisionmakers

Federal Charts 11 and 12 indicate the allocation of the seven federal punitive damages judgments during the study period by decisionmaker: jury or judge. *All* of the seven awards were made by juries and none by a judge. Because of the lack of federal judge awards, no analysis of the differences by decisionmaker is possible for this set of data.

c. Summary: Does the Decisionmaker Make a Difference?

Overall, the study data are too limited to permit a confident comparison among the proclivity of judges, juries, and arbitrators in Hawaii to award punitive damages. The most useful finding is that, while a comparison of the mean awards suggests that state juries do award substantially higher (about sixteen times higher) punitive damage amounts than either judges or arbitrators, the median award of juries is only 1.3 times higher than that of judges and four times higher than that of arbitrators. In addition, under current Hawaii law, any punitive damages award found by a jury can be reviewed by the trial court judge and, if appropriate, a remittitur can be ordered.[489] Therefore, judges already exert ultimate control over "excessive" jury awards in Hawaii courts. On the other hand, the standard of review favors deference to the jury,[490] and therefore some constriction of awards is possible with a judge-only system. On balance, however, the data do not

[489] *See supra* notes 276-283 and accompanying text. *See, e.g., Wilder v. Brown* (Case S37), Appendix B (50% reduction by remittitur).

[490] *See supra* Part II E discussing the standard of review for punitive damages awards.

predict whether a statutory shift in decisionmaking authority of judges would have a meaningful impact on the bulk of punitive damages awards in Hawaii.

D. Macro Trends: Comparing Punitive Damages Trends to Tort Caseload, Population, and Economic Changes in Hawaii

The "caseload trends" portion of this study examined Hawaii tort caseloads for approximately the same period of time as the *PIJH* data, from fiscal year 1984/85 through 1999/00, based on information contained in the State of Hawaii Judiciary's *Annual Report.*[491] Some variations in caseload trends are simply beyond scholarly explanation—varying, one might suspect, with the natural vagaries of life on isolated islands hosting a resident population of 1.2 million and up to six times that many visitors each year, and also reflecting Hawaii's large economic fluctuations since the mid-1980s.[492] Some overall trends are apparent, however, providing an additional lens through which to view the punitive damages data.

1. Hawaii Trends: Tort Case Filings Increasing Slowly

Over the sixteen-fiscal-year period from 1984/85–1999/2000, Hawaii experienced an overall increase in the number of tort cases filed each year, although the numbers fluctuated annually.[493] In 1984/85, a total of 1,676 tort cases were filed, compared to 1,706 in 2000, a net overall increase of only thirty cases (or 1.76%). In the interim years, however, tort caseloads climbed steadily, peaking during 1991/92–1994/95, and falling since then. The average of the four-year peak from 1991/92–1994/95 was 2,770, compared to the 1,676 filed in the first year of the study period 1984/85 (a 65.27% increase). After the peak, tort filings steadily decreased each year back to the mid-1980s level. Overall, the trend was positive (Trends Chart 1, R^2=.089), and the average annual increase in tort filings for the sixteen-year period over the 1984/85 level was 515 cases per year (or 30.72% of the starting caseload in 1984/85). Trends Chart 1 also compares the trends in the filing of tort cases, including motor vehicle ("MV") and non-motor vehicle ("NMV") torts

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[491] *See, e.g.*, State of Hawaii Judiciary, Annual Report: July 1, 1979 to June 30, 1980, 70 tbl. 7 (1980). The *Annual Reports* provide information on caseload activity for each fiscal year in all four circuit courts in the broad categories of civil actions (contract, torts, condemnation, other civil actions, and district court transfers), probate proceedings, guardianship proceedings, miscellaneous proceedings (land court, naturalization, liens, and other special proceedings), as well as criminal actions and supplemental proceedings.

[492] In the late 1980s, Hawaii's economy boomed from an influx of Japanese investment. When the Japanese economy went sour at the end of the decade, Hawaii's economic "bubble" burst, stagnating at only 0.5% growth per year in the 1990s. *The State the Boom Forgot*, THE ECONOMIST, June 18, 1998, at 29.

[493] *See* Trends Chart 1, *infra*.

categories, to all civil cases (contract, tort, condemnation, and other civil actions). Tort filings have increased more slowly than overall civil filings in Hawaii state courts. Examining the percentage of tort cases filed each year and comparing that result to all civil cases filed (Trends Charts 2), the relative percentage of tort cases in the state courts' annual civil docket is only slightly higher in 1999/00, the last year studied, than in 1984/85, the first year of the study (28.3% compared to 25%).[494] Over the entire study period, tort case filings constituted an annual average of 32.5% of the civil filings.[495]

This comparison of tort and all civil case filings for the study period can be characterized by tort reform proponents as indicating both an "explosion" in tort filings and civil litigation generally, reinforcing their claims that Hawaii has become increasingly litigious. The plaintiffs' bar, on the other hand, can argue that, despite the overall increase in tort filings since 1984/85, tort filings have steadily decreased for the past several years. Moreover, this decrease occurred during some years when civil filings were steadily rising. Thus, they can point the finger at other types of civil litigation as the "true culprit" for increasing litigiousness. One way to further refine this discussion is to examine the tort filing increases in light of the changes in the Hawaii population and economy over this same period of time.

2. Hawaii's Per Capita Tort Filings Declined Despite Population Growth

Some national studies claim that the increase in state tort cases merely tracks population growth,[496] while others suggest that filings have grown faster than the population.[497] For Hawaii, the correlation is not evident. During the same period covered by the trends study (1984/85-1999/2000), Hawaii experienced a steady moderate increase in population (Trends Chart 3).[498] Beginning with less than 1.04 million people in 1985, the population grew steadily until it peaked in 1998 at 1.19 million and then dropped slightly in 1999 to 1.185 million people. The net increase between 1985 and 1999 in

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[494] The Hawaii data indicating steady increases in tort filings is comparable to a 1994 study by Thomas B. Marvell, which compared the tort caseloads of fifteen states, including Hawaii, for the 1983 - 1993 decade. Marvell, *supra* note 40, at 195. The year Marvell's study ended, however, marked the beginning of the big decline in Hawaii tort filings, rendering his finding of a high 61% increase in Hawaii tort filings in one decade, the second highest he found for all states, now inaccurate.

[495] The percentage of tort cases filed compared to civil filings increased steadily from 1984/85 until a four-year peak period (1990/91-1993/94) when it averaged 39.8% (Trends Chart 2). The percentage of tort filings then steadily decreased for the following six years until the last period studied (1999/00), dropping to a low of 26% (1998/99) and resting in 1999/00 at 28.3%. *See* Trends Chart 2, *infra*.

[496] Marvell, *supra* note 40, at 193 (citations omitted).

[497] *Id.* (citations omitted).

[498] Population data in Trends Chart 3 is reported by calendar year; tort filings are reported by second applicable fiscal year.

Hawaii's population was 145,000, or 14%. Tort filings for this same period show a substantial increase early on--peaking in the early 1990s--but then declining to earlier levels. As a result, there is no evident relationship between population and tort filings in the state (Trends Chart 3).

Another approach to determining the relationship between population and tort filings is to look at the data in terms of changes over time in per capita filings per 100,000 people. Trends Chart 3, which reports Hawaii tort filings per 100,000 people from 1985–1999, indicates an increase from the starting point in 1985 of 168.70 cases per 100,000; a peak of 255.74 in 1992; and a distinct decline from 249.91 in 1994 to a low of 143.97 in 1999. The mean for the 1985–1999 period was 193.16. These results parallel the findings of Judge Richard Posner's 1997 article on tort caseload trends in the United States and England.[499] His data indicated a "tort case filings per 100,000 of population" rate for Hawaii of 219.6 (mean for the period 1985–1994).[500] If truncated at 1994, the data on Trends Chart 3 indicate a similar mean of 202.80 for this same period, but because the per capita rate began to fall distinctly after 1994, the ending year of the Posner study, the longer range mean (until 1999) is a much lower rate of 193.16.[501]

Thus, when the increase in tort filings is considered in light of population data, two important observations can be made. First, perhaps unlike some of the states examined in other studies, Hawaii's tort filings are not evidently linked to population growth in the state. Second, the per capita rate of Hawaii tort filings decreased in recent years, most notably since 1994. Thus, the overall *increase* in tort filings, when viewed in context of a growing population, actually represents a *decline* in tort litigation *per capita.*

3. Economic Context: Boom and Bust

In addition to population changes, economic changes may play a role in

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[499] Richard A. Posner, Explaining the Variance in the Number of Tort Suits Across U.S. States and Between the United States and England, 26 J. LEG. STUD. 477 (1997).

[500] *Id.* at 479, tbl. 1. For 1986, Posner found a per capita rate for Hawaii of 191.4 per 100,000 population. *Id.* In contrast, the study for this article found a lower rate for 1986 of 169.67. Posner, however, included in his data federal tort filings, which inflated the results. *See id.* at 479 n.8 (noting the inclusion of federal cases, which, while "not well correlated" with state case filings, were on average "less than 10%" of the state figure). The Hawaii study found in 1986, a total of 10 tort *judgments* in federal court (Federal Chart 1), but did not examine tort *filings* for federal court. Assuming, generously, that 90% of all cases do not reach judgment, then there would have been roughly 100 federal tort cases filed in Hawaii in 1986. This would change the total tort filings to 1,885 instead of 1,785, resulting in a per capita rate of 179.18, closer to Posner's results.

[501] Compared to 33 other states and England/Wales, Posner found that Hawaii had the 14th lowest per capita rate of tort filings. Posner, *supra* note 499, at 478, tbl. 1.

tort litigation.[502] During the last fifteen years, Hawaii has undergone a dramatic economic boom and bust cycle. In the late 1980s, the economy was flourishing, primarily due to Japanese investments in real property.[503] When the Japanese economy turned sour just before the end of the decade, it burst Hawaii's economic bubble. Personal bankruptcy cases and unemployment skyrocketed between 1990 and 1997, the same period when Japanese investment dried up.[504]

The overall trend in tort case filings mirrored this general economic trend. As Trends Chart 1 indicates, state tort filings peaked in 1992/93 and then steadily decreased. Although a more extensive economic analysis was outside the scope of this article, considering the data in light of an expected lag from incident to filing, even this rough view of the data suggests that there may be a strong relationship between the state of the economy in Hawaii and tort case filings.

E. Conclusion: Relationship of Trends in Tort Filings, Population, and Economy to Hawaii's Punitive Damages Judgments

Comparing the results of the Hawaii punitive damages study and the data on state trends in tort filings, population, and the economy, suggests that the general decline over time in the number of tort judgments, requests for punitive damages, and punitive damages judgments in Hawaii is more dramatic than when viewed in isolation. Since 1985, the annual number of state court tort judgments has declined, despite a rebound in 1992–1993, and remained below the annual mean of 41.18 for the last seven years of the study (State Chart 1). The annual number of requests for punitive damages declined in a similar pattern, also dropping below the annual mean of 15.29 for the last seven years of the study (State Chart 1). In parallel with these declines, the annual number of punitive damages judgments in state court also declined, and was below the annual mean of 2.29 for the last eight years of the study (State Chart 1). In contrast, the annual number of tort filings has increased steadily over time (although filings also show a significant decline in the past six years of the study (State Chart 15)). Hawiai's population has steadily increased at a rate that generates a *decline* in per capita tort filing rates even though overall filings increased, and this is especially evident in the last six years of the period studied (Trends Chart 3).

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[502] *Id.* at 477 (noting in his study of tort trends that economic variables "such as income, education, and urbanization, can explain much of the variance among these jurisdictions and that cultural factors are less important").

[503] *The State the Boom Forgot*, *supra* note 492.

[504] *Id.*

These recent trends, taken together, suggest a distinctive period of "tort litigation decline" in Hawaii beginning in approximately 1995 and evident through 1999–2001, seen in tort filings, tort judgments, requests for punitive damages, punitive damages awards, and per capita filings of tort cases. Hawaii's economic implosion that unfolded in the 1990s is a suggestive factor that merits further research. If the average jury member is "hurting" economically, is she less inclined to award punitive damages? Although the reasons why tort litigation and punitive damages activity would fall with the economy may, however, be too complex to untangle, further research is warranted

An equally interesting factor worth exploration is whether all of the negative publicity over tort litigation and punitive damages generated by the Hawaii tort reform efforts that commenced in earnest in the late 1980s (*see supra* Part III) somehow dampened the enthusiasm of plaintiffs and their attorneys for seeking, and of juries and judges for awarding, punitive damages. Are plaintiffs' attorneys more hesitant to ask for punitive damages to avoid the popular aversion to punitive damages?

The data in Trends Chart 4 suggest that, during the 1990s, there were distinctive changes in how state court tort cases were resolved, perhaps reflecting changes in plaintiff litigation strategies. For example, the number of cases terminated as a result of dismissal or stipulation (settlement) rapidly climbed after 1990 (almost doubling), then fluctuated dramatically until this kind of termination seemed to decline steadily at the end of the decade, while the other methods of termination (by notice, by judge, by jury verdict, and by non-jury trial) were much less frequently used and remained relatively more stable." Could the increasing resort to settlement explain the decline in punitive damages judgments? These questions deserve further research.

In summary, viewing the punitive damages data in light of the macro trends data enriches our understanding of the claim that Hawaii has recently experienced an "explosion" in punitive damages awards. There are many lenses with which one can view the problem, some of which lead to varying conclusions even with the same data. However, on the whole, the data show that punitive damages judgments (both in number and amount) have fallen steadily despite a slow rise in tort caseloads and a general increase in population.[505] Ironically, the same adverse economic conditions that have helped fuel the tort reform movement in Hawaii, and the adverse publicity

[505] The long decline in the average annual amount of punitive damages judgments since 1988 was, however, drastically upset by the one high award in the *Takaki* case (S39) in 2001 (*see* State Chart 6 *and* Part V C 1, *infra*).

generated by the movement itself, might be more effective brakes on punitive damages awards than any successful legislative reform. These "soft" indicators could be explored with extensive interviews but not through any existing quantitative data. Qualitative data on the specific facts of the cases in which punitive damages were reported, however, is a critical additional tool that can be used to reach a more refined understanding of the nature of the punitive damages system in Hawaii. The next Part analyzes the extensive qualitative data available for the study period through the detailed reports in *PIJH*.

V. THE QUALITATIVE CONTEXT: THE REAL STORIES BEHIND HAWAII'S PUNITIVE DAMAGES JUDGMENTS

> ***Takaki v. Cambra*** (Case S39): Defendant George Cambra conspired to burn the trucks of his only competitors in the cut-throat Hawaii movie production business. Plaintiff William Takaki's truck was burned to the ground, destroying his family financially and forcing him into bankruptcy. A State court jury awarded Takaki, his wife, and daughter $400,000 in emotional distress damages and $4,785,974 in punitive damages.

This Part examines the past seventeen years of Hawaii punitive damages judgments in qualitative terms and presents the real stories behind the statistics. Analyzing the judgments in detail and by case category provides some valuable insights into the accuracy of the popular conceptions about punitive damages awards. The coding analysis also allows some useful comparisons between Hawaii judgments and those reported in the Florida study. This "micro" examination of the judgments presents a portrait of punitive damages judgments that is very different from the rhetorical criticisms, both locally and nationwide.

A. The Value of Qualitative Scholarship

Qualitative scholarship "is a growing enterprise worldwide,"[506] particularly in the fields of sociology and anthropology of education.[507] Although it

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[506] PAMELA MAYKUT & RICHARD MOREHOUSE, BEGINNING QUALITATIVE RESEARCH: A PHILOSOPHIC AND PRACTICAL GUIDE viii (1994).

[507] *Id.* For a general guide to qualitative research, see DAVID SILVERMAN, ED., QUALITATIVE RESEARCH: THEORY, METHOD AND PRACTICE (1997). *See also* MATTHEW B. MILES & A. MICHAEL HUBERMAN, AN EXPANDED SOURCEBOOK: QUALITATIVE DATA ANALYSIS 1 (Sage Publications 2d ed. 1994) (noting the shift toward the qualitative research paradigm); STEVEN I. MILLER & MARCEL

suffers from the misguided perception that it is less serious than quantitative methods, qualitative research, if done properly, can be equally rigorous, involve extensive data analysis, and offer a transparent research process.[508] For the qualitative researcher, the phenomenological and perspective-based approach captures "people's stories [and] the particulars of people's lives and what they mean," while the positivist paradigm of the quantitative approach "seeks to transcend the particular by higher and higher reaching for abstraction, and in the end disclaims in principle any explanatory values at all where the particular is concerned."[509] The definitions of qualitative research vary, including such "diverse expressions" as "analytic induction, content analysis, semiotics, hermeneutics, elite interviewing, the study of life histories, and certain archival, computer, and statistical manipulations."[510]

The qualitative approach should be familiar to the legal scholar, given the tradition of interpreting legal texts and of a "tolerance for ambiguity."[511] The presentation of the case narratives in this study also draws on the growing scholarship of legal narrative or "storytelling."[512] This scholarship has focused largely on the narrative of "outsiders" such as minorities and women,[513] and tort victims similarly can be seen as a class whose "voice and perspective . . . have been suppressed, devalued, and abnormalized."[514] These "torts stories"[515] seem rarely to be considered in the public policy debate, but that should change. They should be illuminating to those considering modifying the punitive damages system in Hawaii and elsewhere. The

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FREDERICKS, QUALITATIVE RESEARCH METHODS: SOCIAL EPISTEMOLOGY AND PRACTICAL INQUIRY (1994).

[508] *See* MAYKUT & MOREHOUSE, *supra* note 506.

[509] *Id.* at 18 (quoting JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 13 (1986)).

[510] JEROME KIRK & MARC L. MILLER, RELIABILITY AND VALIDITY IN QUALITATIVE RESEARCH 10 (1986).

[511] MAYKUT & MOREHOUSE, *supra* note 506, at 35 (noting the difficulty for researchers of letting the data speak for themselves because "it requires a tolerance for ambiguity").

[512] *See, e.g.*, GARY BELLOW & MARTHA MINOW, Eds., LAW STORIES (1996); PETER BROOK & PAUL GEWIRTZ, EDS., LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (1996); ROBERT L. RABIN & STEPHEN D. SUGARMAN, TORTS STORIES (2003); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE AND JUST. 87 (1998).

[513] *See* Love, *supra* note 512, at 87 n.2 ("'Outsider' scholarship is often written by feminists and members of racial minority groups."). *See also* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 824 (1993); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R-C.L. L. REV. 323, 324-26 (1987).

[514] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) (defining outsiders, whom he calls "outgroups"). *See also* Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992) (describing the rise of outsider scholarship within legal scholarship).

[515] RABIN & SUGARMAN, *supra* note 512.

victims and defendants are not strangers; especially in a small state like Hawaii, they are our neighbors.

B. Hawaii Case Narratives: Overview

The stories underlying the sixty-three Hawaii punitive damages judgments (state, CAAP, and federal) from 1985 through 2001 provide important insights into charges that the tort system is out of control. Although it is difficult to categorize cases with multiple causes of action, even a basic sorting of the cases by their primary allegation reveals some notable patterns about what kinds of cases are "drivers" of punitive damages awards.[516]

This study divided the cases into eight categories, attempting to join together cases with similar themes and facts. The eight categories designated were: 1) Violent Aggressors: assault, battery, and arson; 2) Abusers of Power: sexual harassment, wrongful termination, retaliatory discharge; 3) Reckless and Intoxicated Drivers: drunks and speeders; 4) Gross Negligence: dog bites, shorebreak accidents, medical fraud, workplace injury; 5) Offenses Against Mental and Physical Freedom: intentional/negligent emotional distress, defamation, false arrest, malicious prosecution; 6) Dishonesty: fraud, conversion, breach of contract; 7) Unsafe Products; and 8) Turning the Tables: cases in which defendants won reverse punitive damages. (Tables and appendicies referenced in this section may be found at the conclusion of this article, and on the author's website.[517]) Table 2 displays the overall distribution of the cases among the categories. As indicated in Table 2, of sixty-three[518] punitive damage judgments reported in Hawaii during the study period, thirty-nine were state court judgments (62% of the total); seventeen were CAAP awards in which judgment was entered (27% of the total); and seven were federal court judgments (11%). The predominant type of case in which punitive damages were awarded was Category 1: Violent Aggressors, which included twenty-three cases, or 37% of the total judgments. Category 2: Abusers of Power included eleven cases, 17% of the total judgments. Category 3: Reckless and Intoxicated Drivers, included ten cases, 16% of the

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[516] This study provides limited comparative information within each case category. *See infra* Part V C. Other studies with larger numbers of judgments probe these questions more deeply. *See, e.g.*, Robbennolt, *supra* note 56, at 165 n.284 (finding, for example, that rates of punitive damage awards "are higher in cases involving fraudulent or intentional misconduct and in cases involving slander or libel, employment harassment or discrimination, or unfair business practices").

[517] *See* http://www2.hawaii.edu/~antolini. Due to layout constraints, some tables are not printed in this article but are available on the author's website.

[518] In one of these judgments (*Vidmar v. Kan*, Case S24, verdict sheet available from author upon request) both the plaintiff and the defendant (on his counterclaim) were awarded punitive damages. For ease of analysis, the case is counted as one case, unless otherwise indicated.

total judgments. The next largest category was Category 5: Offenses Against Mental and Physical Freedom, which included eight cases, or 13% of the total. Together then, Categories 1, 2, 3, and 5 (violent aggressors, abusers of power, reckless/intoxicated drivers, and defendants who distressed, defamed, falsely arrested, and maliciously prosecuted plaintiffs) constituted a total of 83% of all punitive damages judgments in Hawaii for the seventeen years studied. The remaining categories were each under 10% of the cases: Category 4: Gross Negligence: five cases or 8%; Category 6: Dishonesty: two cases, or 3%; Category 7: Unsafe Products: two cases, or 3%; and Category 8: Reverse (Defendants') Punitive Damages: two-three cases, or 3%.

Case category distribution was highly related to jurisdiction. Seventy-nine percent of all state punitive damages judgments fell into Categories 1, 2, 3, and 5. All of the CAAP cases fell into Categories 1, 2, 3, and 4 (not 5), and, of those, 59% fell into Category 1. There were no CAAP punitive damages awards for the study period in Categories 5-8 (Offenses Against Mental/Physical Freedom, Dishonesty, Unsafe Products, and Reverse Awards). The federal cases arrayed very differently than the CAAP cases (which reflects the different jurisdictional foundation of federal court): almost half (three or 43%) of the federal punitive damages judgments were in Category 5 (Defamation, False Arrest, Malicious Prosecution, and Emotional Distress); two (29%) fell into Category 2 (Abusers of Power), and one each (14% each) fell into Categories 4 (Gross Negligence) and 8 (Reverse Punitives). None of the federal punitive damages judgments involved Category 1 (Violent Aggressors), which is not surprising given that assault and battery is a classic state tort claim with no direct federal nexus (and, because of Hawaii's isolation, unlike in many states, there are not as many state tort cases in federal court under diversity jurisdiction). Similarly, there were no federal punitive damages judgments in Categories 3, 6, or 7.

Appendix B contains the summary narratives of all 63 punitive damages judgment cases analyzed in this study. The following parts analyze common themes in these narratives, present selected case narratives, and provide relevant statistical information.

C. Hawaii Case Narratives

1. Category 1: Violent Aggressors

The common element of the twenty-three cases in Category 1 is defendants who are violent aggressors.[519] All but one case involved claims of assault and battery, most often with severe injuries resulting to the plaintiff. In seven of

[519] *See* Table 1 and Appendix B, *infra*.

the cases,[520] women were abducted, beaten, raped, assaulted, abused, and abandoned. One case (*Hubert v. Spotts Cleaning*, C12) involved sexual assault on a sleeping man by another man. In four of the cases,[521] the abuse came from the hands of police officers or security guards. Conversely, police officers and security guards were the victims of violence in two cases (*DeGuiar v. Logan*, C2, and *Du Pont v. Pichay*, C8). Two cases involved fights between children or teenagers (*Niesl v. Statnon*, S9; *Rod v. Fanell*, S19). Three cases involved brawls at bars (*Kfentzis v. Azubu U.S.A.*, S27; *Kim v. Nova International Hawaii Co.*, S32; *Mcauley v. Sonke*, S34). The remaining cases involved: inmate violence on another inmate (*Santiago v. King*, S28); arson (*Takaki v. Tavares*, S39); a domestic shooting (*Gregory v. Ah Loy*, C6); a sports injury (*Armstrong v. Childress*, C7); and assault on a disabled man (*Ching v. Yan-To Wong*, C10).

In one representative assault-and-battery case, *Mcauley v. Sonke* (S34), three men at a beachside bar in Waikiki were rating passing females by holding up scores on napkins. Plaintiff Mcauley, a 30-year-old female visitor, insulted by the men's actions toward her, tossed her shoe at them. When Mcauley attempted to retrieve the shoe, defendant Sonke punched her, pushed her to the ground, and continued to abuse her until strangers came to her aid. Mcauley suffered back injuries, black and blue eyes, and trauma after the incident. The jury apportioned fault 20% to Mccauley, 55% to Sonke, and 25% to the bar, awarding general damages of $49,600, special damages of $16,000, and punitive damages against Sonke of $62,000.

Of the twenty-three cases in Category 1, the state cases predominate, consisting of thirteen or 57% of the cases (Table 2). Compensatory damages awards in the state cases totaled $1,216,713, with a mean of $93,593, and a median of $40,000 (Table 4). Punitive damages awards in the state cases totaled $5,292,514, with a mean of $407,116, and a median of $20,000. The punitive-to-compensatory damages ratio in these cases ranged from a low of .02 ($40: $2493 – *Niesl v. Stanton*, S9, kids' fight) to a high of 11.9 ($4,785,974: $400,000 – *Takaki v. Tavares*, S39, the arson case), with a mean ratio of 2.43, and a median ratio of 0.79. Either a 2:1 or 3:1 cap would have affected four of the cases.

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[520] These seven Category 1 cases were: Ofisa v. Navarette (S3), Caris v. Ludloff (S4), Vidmar v. Kan (S24), Harper v. Freitas (C5), Panganiban v. Faulise (C9), and Doe v. Mew (C14). Summaries of cases discussed in Part V are provided in Appendix B, *infra*; PIJH verdict sheets available from author upon request.

[521] Batungbacal v. Young (S8), Sigler v. City & County of Honolulu (S10), Oakes v. Ohio (S12), and Rosette v. Caling (C11).

Gregory v. Ah Loy (Case C6): Defendant Ah Loy admitted that, without provocation, he shot Gregory, who was visiting his former girlfriend's home to retrieve personal property. The bullet entered the base of Gregory's penis and traveled to his right femur. The CAAP Arbitrator awarded $317,316 in general damages and $100,000 in punitive damages.

In Category 1, there were ten CAAP cases, or 43% of the total (Table 2). As expected, because of the lower threshold value in CAAP cases, compensatory awards in the CAAP cases were much lower than in the state cases, totaling $483,762, with a mean of $48,376, and a median of $20,895 (Table 4). (Notably, the median for the CAAP cases and the state cases was almost the same.) Punitive damages awards in the CAAP cases were also substantially lower, totaling $321,850, with a mean of $32,185, and a median of $14,375 (about 1/3 that of the state median). The punitive-to-compensatory ratio in these CAAP cases ranged from "infinite" ($100:0 – *DeGuiar v. Logan*, C2, missed punch) to a high of 2.67 ($32,000: $12,000 – *Doe v. Mew*, C14, woman lured and sexually assaulted), with a mean ration of 1.02, and a median ratio of 0.96. If a 2:1 cap were imposed on CAAP cases, it would have affected two of the CAAP cases (*Deguiar v. Logan*, C2 and *Doe v. Mew*, C14). A 3:1 cap would have affected only *DeGuiar*, the case with no compensatory award.

There were no federal cases in Category 1.

For all cases in Category 1, compensatory damages totaled $1,700,475, with a mean of $73,934, and a median of $20,949 (Table 4). Punitive damages totaled $5,614,364, with a mean of $244,103, and a median of $20,000. The punitive-to-compensatory ratio mean was 1.82, the overall mean ratio was 3.30,[522] with a median of 0.84, below the proposed 2:1 cap.

A prominent characteristic of Category 1 cases is that they overwhelmingly involved lawsuits by individuals against individuals. This is also true of Category 3 cases (Reckless and Intoxicated Drivers) discussed in subpart 3 below. When all of the sixty-three punitive damages judgments are examined for the type of defendants involved in the case,[523] twenty-two of them (35%) involved only individual defendants. All but one of these cases were Category 1 (eleven cases) or Category 3 cases (ten cases).[524] Thus, even

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[522] *See supra* notes 458 for an explanation of how these means were calculated. *See also supra* notes 459 & 482.

[523] *See* Table 13, available at http://www2.hawaii.edu/~antolini.

[524] This count underestimates cases involving primarily individuals as defendants because cases with mixed defendants (*e.g.*, an individual and even a dismissed business named as a defendant) were not

though it contradicts the characterization of tort reformers that punitive damages judgments are of greatest concern to businesses as potential defendants, the debate about punitive damages reform should acknowledge that the typical punitive damages case in Hawaii involves individual victims suing individual defendants who are either violent aggressors or reckless intoxicated drivers. This dominant type of "torts story" is not, however, mentioned in the rhetoric of reform. The general public may be much more sympathetic to punitive damages in general if they were aware of the frequency of awards in the context of this kind of personal violence.

2. Category 2: Abusers of Power

The eleven judgments in Category 2 involved defendants who abused their power relationship with the plaintiff through sexual harassment, wrongful termination, or retaliatory discharge.[525] In eight of those cases (73%), the plaintiff was female. In six of the cases, the plaintiff was fired or forced to quit by employers who were: seeking to prevent plaintiff from testifying to a grand jury that would incriminate defendant (*Parnar v. Americana Hotels, Inc.*, S11, a $1.5 million judgment, upheld on appeal by the Hawaii Supreme Court)[526]; punishing a whistleblower (*Calleon v. Miyagi*, S25); replacing the older female plaintiff sales manager with younger male sales agents (*Sullivan v. South Seas Motors, Inc.*, S33); discriminating against an older male (*Schefke v. Reliable Collection Agency Ltd.*, S35); requiring the plaintiff to work on Sabbath, against her religion (*Floyd v. Wakenhut of Hawaii*, C16); and defaming the employee (*Mano v. Hawaii Teamsters & Allied Workers Union, Local 996,* F5). Three of the cases involved sexual harassment by male supervisors on the job (*Wilder v. Paul Brown International, Ltd.*, S37; *Laronal v. Hopper*, C1; *Arceneaux v. Hotel Employees & Restaurant Employees Local 5 Union*, F4), and one involved a male employee harassed by a homosexual supervisor (*Awai v. Interstate Cleaning Corp.*, S38). The final case involved a male psychiatrist whose fraudulent testimony resulted in the forced eviction of a woman and her children (*Sorrell v. Lynn*, S5).

> ***Awai v. Interstate Cleaning Corp.*** (Case S38): Plaintiff, a young male night janitor, claimed that his male supervisor sexually harassed him on the job. Plaintiff's wife also suffered emotional distress when the supervisor made outrageous remarks directed at her and to her over the

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counted. *See id.*

[525] *See* Table 5 and Appendix B, *infra.*

[526] *See supra* note 280.

phone. The state court jury awarded plaintiff husband and wife $50,607 in compensatory damages and $15,000 in punitive damages.

In Category 2, there were seven state cases, or 64% of the total (Table 2). Compensatory awards in the state cases totaled $3,100,600, with a mean of $442,942, and a median of $504,892 (Table 5). Punitive damages awards in the state cases totaled $2,545,000, with a mean of $363,571, and a median of $150,000. The punitive-to-compensatory ratio in these state cases ranged from a low of 0.23 ($150,000: $644,510, *Calleon v. Miyagi*, S25 - whistleblower) to a high of 17.24 ($50,000:$2,900 – *Wilder v. Paul Brown*, S37, hair salon employee sexually harassed by owner), with a mean ratio of 3.45, and a median ratio of 0.59. If a 2:1 cap were imposed on state cases, it would have affected three of the state cases in this category (*Sorrell v. Lynn*, S5; *Parner v. Americana Hotels, Inc.*, S11; and *Wilder*); a 3:1 cap would have affected only one case, *Wilder* (S37), noted above, which had the 17.24 ratio.

In Category 2, there were two CAAP cases, 18% of the total. In the first case (*Laronal v. Hopper*, C1), the compensatory award was $13,318, and the punitive award was $5,000, with a ratio of .38 (Table 5). In the second case (*Floyd v Wakenhut*, C16), the compensatory award for the woman forced to work on her religious Sabbath was $3,114, and the punitive award was $5,000, generating a ratio of 1.61. Overall, the mean compensatory award for Category 2 CAAP judgments was $8,216, the mean punitives award was $5,000, and the mean ratio was .995.

There were two federal cases in Category 2, 18% of the total, both involving female union employee plaintiffs (Table 5). In those cases (*Arceneaux v. Hotel Employees & Restaurant Employees Local 5 Union*, F4, and *Mano v. Hawaii Teamsters & Allied Workers Union, Local 996*, F5), the total compensatory award was $175,750, with a mean and median of $87,875; the total punitive damages award was $160,000, with a mean and median of $80,000. The mean and median ratio was 2.8.

Wilder v. Paul Brown International, Ltd, (Case S37): Plaintiff, a 38-year-old single woman who was the cosmetics director for Honolulu hairstylist Paul Brown, alleged she was subjected to sexual harassment, such as touching, exposing, and verbal comments, on and off work premises, resulting in emotional distress and a hostile work environment that caused her constructive discharge and clinical depression. After a six-day trial, the jury found for plaintiff on the assault count only, and for defendant on the other counts, awarding about $4,000 in compensatory damages and punitive damages of

$100,000, which Judge Kevin Chang reduced to $50,000.

Considering all judgments in Category 2, the total of the compensatory damages awarded was $3,292,782, with a mean of $299,343. and a median of $50,607 (Table 5). Punitive damages judgments totaled $2,715,000, with a mean of $246,818. and a median of $60,000. The mean ratio for this Category was 2.88, the overall mean was .82, and the median was 0.61. A 2:1 cap would have reduced four of the eleven awards in Category 2 (36%), although a 3:1 cap would have affected only two cases (18%) (the 17.24 ratio in *Awai v. Interstate Cleaning Corp.*, S37, involving a $50,000 punitives award already cut in half by the trial court judge, and the 5.0 ratio in *Arveneaux v. Hotel Employees & Restaurant Employees Local 5 Union*, F4, a $60,000 punitive damages award).

A common element of nine of the eleven cases in this category[527] was that they involved punitive damages judgments assessed in whole or in part against an employer of the plaintiff employee, for claims ranging from wrongful termination to sexual harassment. Seven of these cases involved private business defendants and two involved unions as employers. These types of employee cases, therefore, are a dominant arena for the assessment of punitive damages against "Hawaii businesses," yet they are not the prototypical story employed by the tort reform movement. Given the facts in these cases, it would indeed be difficult to find sympathetic allies for these aberrant "business defendants."

3. Category 3: Drunk Drivers and Speeders

The ten cases in Category 3 involved defendants who were reckless or intoxicated drivers (Table 6).[528] Seven of the cases involved a drunk driver.[529] In seven cases,[530] the driver admitted liability. In two cases, the driver fled the scene (*Cuson v. Agag*, S13, and *Reder v. Seyler*, S15). Edward Agag, the defendant driver in case S13, described below, had his friend's car crashed into children on a school lawn before fleeing. One case involved two minors who hit an elderly woman plaintiff when they were speeding on the freeway

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[527] *See* Table 13. The defendants in these cases were: S11 (Americana Hotels and Flagship International); S25 (MTL, Inc.); S33 (South Seas Motors); S35 (Pacific Medical Collections, Inc.); S37 (Paul Brown Int'l Ltd.); S38 (Interstate Cleaning Co.); C16 (Wackenhut); F4 (Local 5 Union); and F5 (Teamsters Union).

[528] *See* Table 6 and Appendix B, *infra*.

[529] Sananikone v. Large, S2; Cuson v. Agag, S13; Reder v. Seyler, S15; Tilton v. Rivera, S17; Uyeoka v. Kinkaid, S18; Ito v. Esias, C4; and Subia v. Batula, C15. *See* Appendix B, *infra*.

[530] Nakagawa v. Chevas, S1; Sananikone v. Large, S2; Reder v. Seyler, S15; Tilton v. Rivera, S17; Uyeoka v. Kinkaid, S18; Searles v. Sweeny, C3; and Subia v. Batula, C15. *See* Appendix B, *infra*.

after returning home from Hawaii Raceway Park (*Yuson v. Thi Bui*, C13).

Cuson v Agag (Case S13): Defendant Agag drove his friend's black Toyota onto the sidewalk and lawn of Farrington High School, running down plaintiff children, who were walking on the lawn. Agag then fled the scene, traveling through the hallway, the lawn, and soon crashing into a fence. Agag had a BAC of .271, more than 3 times the legal limit. Then Circuit Court Judge Ronald Moon awarded plaintiffs $275,000 in compensatory damages and punitive damages of $7,500.

In Category 3, there were six state cases, 60% of the total. Compensatory awards in the state cases totaled $5,765,915, with a mean of $960,985. and a median of $161,010 (Table 6). Punitive damages awards in the state cases totaled $128,000, with a mean of $21,333. and a median of $11,250. The punitive-to-compensatory ratio in these state cases ranged from a low of 0 in three cases ($2,500: $1,212,810, *Nakagawa v. Chevas*, S1; $4,110: $3, *Tilton v. Rivera*, S17; and $4,212,000: $25,000, *Uyeoka v. Kinkaid,* S18) to a high of 1.6 ($75,000: $47,020, *Sananikone v. Large*, S2), with a mean ration of .44, and a very low median ratio of 0.02. If either a 2:1 or 3:1 cap were imposed on state judgments, it would have affected none of them

In Category 3, there were four CAAP cases, 40% of the total (Table 6). In these cases, the total compensatory award was $148,432, with a mean of $37,108, and a median of $25,000. The total punitive award was $29,001, with a mean of $7,250, and a median of $7,000. The mean ratio was 0.195 and median was 0.13. Viewed collectively, these cases were well below the proposed ratio caps.

There were no federal cases in Category 3.

Uyeoka v. Kinkaid **(S18)**: Plaintiff Jon Oshiro, a 23-year-old single man, was driving along Kalanianaole Highway when he was hit by defendant William Kinkaid driving the opposite direction in the wrong lane. Kinkaid was attempting to pass traffic across the center line and hit Oshiro head on, causing plaintiff catastrophic injuries, including severe brain damage and confinement to a wheel chair. Kincaid had a blood alcohol level three times the legal limit; he was speeding, fleeing the scene of another vehicle collision that he had caused, and uninsured; and he had ignored a friend's warning not to drive. In a jury-waived trial, Judge Marie Milks awarded to Oshiro and his mother Mildred Uyeoka compensatory damages of $4,212,000 in compensatory damages and punitive damages of $25,000.

Considering all "Reckless and Intoxicated Drivers" cases, the total of the compensatory damages awarded was $5,914,347, with a mean of $591,435 (about twice the mean in Category 2, and almost eight times higher than the mean in Category 1), and a median of $37,010 (about $13,000 less than the median in Category 2, and about $17,000 higher than in Category 1). Punitive damage judgments totaled $154,004, with a mean of $15,400 (sixteen times lower than the means in Categories 1 and 2), and a median of $9,750 (about half of Category 1, and 1/6 of Category 2). The mean ratio for this Category was .34 (compared to 1.82 for Category 1, and 2.88 for Category 2), with a median of .05 (0.84 for Category 1; 0.61 for Category 2). A 2:1 cap or 3:1 cap would have had no effect on the awards in Category 3.

4. Category 4: Gross Negligence

The five judgments in Category 4: Gross Negligence involved a variety of factual settings.[531] Two cases (*Chase v. State of Hawaii*, S23 and *Mitchell v. Physicians Health Plan of Minnesota*, F2) involved lawsuits against Maui hotels by tourists for severe injuries resulting from shorebreak accidents. In one case (*Kanehe v. Brisebois*, S6), an Akita with a history of attacking people bit the walking plaintiff multiple times. In the notorious fourth case, the only major medical malpractice case in the study, a plastic surgeon severely botched a breast implant procedure (*Ditto v. McCurdy*, S26). In the last case (*Hart v. Pierner*, C17), an allegedly inebriated chiropractor negligently conducted a cervical adjustment and inappropriately touched the plaintiff.

> ***Ditto v. McCurdy*** (Case S26): Plaintiff, a 32-year-old married bar hostess sued Dr. McCurdy, a surgeon who performed breast implant surgery on plaintiff. Because of the botched procedure, plaintiff underwent three more breast surgeries under general anesthesia the same day; contracted a breast infection; underwent four breast manipulations and surgeries to break up scar tissue; developed a hematoma; was improperly sutured by defendant's unlicensed medical assistant; and ultimately had other physicians remove her implants because of complications. A state court jury awarded plaintiff $1,403,500 in compensatory damages and $600,000 in punitive damages.

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[531] *See* Table 7 and Appendix B, *infra*.

In the three state cases in Category 4, the compensatory awards totaled $1,716,550, with a mean of $572,183, and a median of $282,750 (Table 7). Punitive damages awards in the state cases totaled $1,115,000, with a mean of $371,667, and a median of $440,000. The punitive-to-compensatory ratio in these state cases ranged from a low of .43 to a high of 2.48, with a mean ratio of 1.49, and a median ratio of 1.56. The 2:1 cap would have affected only one of the three cases (*Kanehe v. Brisebois,* S6); the 3:1 cap would not have affected any of these cases

There was only one CAAP case in Category 4. For the inappropriate chiropractic treatment in *Hart v. Pierner* (C17), the arbitrator awarded $9,465 in compensatory damages and about the same amount, $9,400, in punitive damages, generating a ratio of .99.

In the only federal case in Category 4, the compensatory award totaled $9.2 million and the punitive award totaled $3 million, yielding a ratio of .32. This case (*Mitchell v. Physicians Health Plan of Minnesota,* F2) involved the Mauna Kea Beach Hotel's failure to warn a guest of a dangerous shorebreak in front of the hotel. The plaintiff Norman Mitchell was rendered a quadriplegic by the swimming accident. Plaintiff claimed that the hotel was aware of 137 prior accidents, including three that resulted in quadriplegia. After a 13-day trial, the jury found the hotel 53% at fault, and plaintiffs 47% at fault, awarding $3.7 million in special damages, $2 million in general damages, and $3 million in punitive damages. Norman's wife Miriam received $2.5 in compensatory damages for her claims.

Considering all cases in Category 4: Gross Negligence, the total of the compensatory damages awarded was $10,926,015, with a mean of $2,185,203, and a median of $282,750 (about two times the total compensatory awards in the next highest category, Category 3: Gross Negligence; a mean about four times higher than Category 3; and a median almost eight times higher than Category 3). Punitive damages judgments totaled $4,124,400 (less than the $5.6 million total of all awards in Category 1: Violent Aggressors), with a mean of $824,880 (about three times the mean award in both Categories 1 and 3: Reckless and Intoxicated Drivers), and a median of $440,000 (more than seven times the next highest median of $60,000 for Category 2: Abusers of Power). The mean ratio for this Category was 1.16 (lower than Category 2, 2.88, and Category 1, 1.82, but higher than Category 3, .34), with an overall mean ratio of .38 (third lowest of the first four categories), and a median of .99 (the highest median of the four categories). A 2:1 cap would have affected only one judgment in Category 4, the *Kanehe v. Brisebois* case (S6), where defendant's Akita bit the plaintiff multiple times, puncturing his left testicle, left thigh, and palm. The dog had

a history of biting five other people, including the plaintiff's grandson. The 2:1 cap would have reduced the punitive damages award from $75,000 to $60,600. The 3:1 cap would have had no impact on the awards in Category 4.

5. Category 5: Violations of Mental and Physical Freedom

The eight cases in Category 5 involved a variety of abuses of the mental and physical freedom of plaintiffs.[532] Ironically, Dr. McCurdy, one of the defendants who secured a punitive damages award in this Category by suing another surgeon for defamation (*McCurdy v. Schlesinger*, S20) was the subject of the very large punitive damages award in Category 4 (Gross Negligence) four years later (described above, *Ditto v. McCurdy*, S26). One case (*Lessary v. Lessary*, S22) involved coercion by an attorney, Leonard Appell, who was also the subject of a punitive damages award in Category 6: Dishonesty (*Rodman v. Appell*, S21). Two other cases involved attorneys: one where an attorney maliciously defamed another attorney (*Mohr v. Kaan*, S30) and one (*Locricchio v. Legal Services Corporation of Hawaii*, F1) involving the former head of Legal Services Corporation of Hawaii ("LASH"), Anthony Locricchio, who won a substantial judgment against other lawyers in the LASH office for defamation, interference with contract, and wrongful termination. Three cases involved false arrest or malicious prosecution: one by a large merchant (*Clawson v. Sears, Roebuck & Co.*, S14), one by officers who incarcerated and abused a woman who had claimed she had been raped (*Carnell v. Grimm*, F6), and one where an unlawful search and seizure by defendant police officers resulted in plaintiff's incarceration for three years (*Pulse v. City & County of Honolulu*, F7). The following case (*Schmidt v. AOAO Marco Polo Condominium,* S29) involved a very heated personal feud that led to a punitive damages verdict despite the lack of compensatory damages:

> ***Schmidt v. AOAO Marco Polo Condominium*** (Case S29): Plaintiff Schmidt, a realtor who lived and had an office at the Marco Polo Condominiums, heard conversations between the security officer and AOAO president referring to shooting plaintiff, hiring a big Samoan " "to kill him, calling plaintiff and his wife crooks . . . liars . . . Nazis," and over 200 other similar statements. After a twenty-two-day trial, the jury held for defendants on all substantive counts, but nonetheless awarded punitive damages of $35,000.

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[532] *See* Table 8 and Appendix B, *infra*.

In the five state cases in Category 5, the compensatory awards totaled $244,352, with a mean of $48,870, and a median of $25,000 (Table 8). Punitive damages awards in the state cases totaled $906,500, with a mean of $181,300, and a median of $35,000. The punitive-to-compensatory ratio in these state cases ranged from "infinite" (S29, the *Schmidt* case, described above), to a high of 4.42 ($800,000:$181,000, in *Lessary*, S22, attorney coercion), with a mean ratio of 1.69, and a median ratio of 1.5. The 2:1 and the 3:1 cap would have affected two cases of these five state judgments (*Schmidt,* S29 and *Lessary*, S22). No CAAP cases appeared in Category 5.

Pulse v. City & County of Honolulu (Case F7): Plaintiff Pulse, a carpenter apprentice who lived on a sailboat in Keehi Harbor Lagoon, was arrested by two Honolulu police officers who were called to the scene by a report of terroristic threatening. The officers claimed that plaintiff's gun was in plain view. Pulse was incarcerated for three years. A federal court jury found that the search and seizure were illegal, resulting in wrongful incarceration. The jury awarded $50,000 in general damages and $350,000 in punitive damages.

In the three federal cases in Category 5, the compensatory awards totaled $509,000, with a mean of $169,667, and a median of $50,000. Punitive damages awards in the federal cases totaled $515,000, with a mean of $171,667, and a median of $100,000. The punitive-to-compensatory ratio in these federal cases ranged from a low of .23 ($427,000:$100,000, *Lochricchio,* F1) to a high of 7.0 ($350,000: $50,000, *Pulse*, F7), with a mean ratio of 3.09 and a median ratio of 2.03. The 2:1 cap would have affected two of these federal judgments (*Carnell v. Grimm*, F6; and *Pulse*, F7), and the 3:1 cap only one (*Pulse*).

Considering all of these Offenses Against Mental and Physical Freedom judgments in Category 5, the total of the compensatory damages awarded was $753,352, with a mean of $94,169, and a median of $34,500 (the lowest of the first five categories, less than half of the total of $1.7 million total in Category 1: Violent Aggressors). Punitive damages judgments totaled $1,421,500, with a mean of $177,688 (the fourth lowest), and a median of $57,500 (the second lowest). The mean ratio for this Category was 2.22 (the second highest), with an overall ratio of 1.89 (second highest), and a median ratio of 1.75 (the highest, more than twice that of the next highest median ratio of .84 for Category 1). A 2:1 cap would have impacted half of the awards in Category 5, and the 3:1 cap would have affected three of them. The most dramatic impact of a cap would have been in two cases: *Schmidt* (S29), where punitive

damage would have been barred entirely because of the lack of a compensatory award for the repeated verbal harassment of the defendants (*see* narrative *supra*), and the *Pulse* case (F7), in which plaintiff was unlawfully incarcerated for three years in federal prison (reducing the punitive award from $350,000 to $100,000 under a 2:1 cap and to $150,00 under a 3:1 cap).

6. Category 6: Dishonesty

> ***Critcher v. Critcher*** (Case S7): A mother sued her adult son (a savings and loan executive) for breach of contract, fraud, emotional distress, breach of confidential trust, constructive trust, and wanton and reckless acts resulting from the sale of real property. The son's counterclaims for malicious prosecution, libel/slander, and abuse of process were dismissed as frivolous, and attorneys' fees were granted to the mother. The state court jury awarded the mother $95,000 in compensatory damages and $10,000 in punitive damages.

Only two cases fell into Category 6, and both involved extraordinary levels of dishonesty.[533] The *Critcher v. Critcher* judgment (S7), described above, and *Rodman v. Appell* (S21), another case involving the attorney Leonard Appell, who was also hit with an $800,000 punitive award in a Category 5 case (*Lessary*, S22):

> ***Rodman v. Appell*** (Case S21): Plaintiff had retained attorney Leonard Appell, who had been denied a license to practice law in New Hampshire for lack of moral integrity, to represent him in a malpractice action, when Appell removed all or most of a $10,000 retainer provided by plaintiff from the attorney trust account without his consent. Appell's counterclaims were dismissed. He failed to answer the complaint, took a default judgment, and filed for Chapter 7 bankruptcy. After the bankruptcy stay was lifted, the state court jury awarded plaintiff special damages of $12,943 and punitive damages of $250,000.

In these two cases, the compensatory awards totaled $107,943, with a mean and median of $53,972. The punitive damages awards totaled $260,000, with a mean and median of $130,000. The punitive-to-compensatory ratios in these two state cases were 0.10 (*Critcher*, S7) and 19.32 (*Rodman*, S21), resulting in a mean and median ratio of 9.71. The 2:1

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[533] *See* Table 9 and Appendix B, *infra*.

or 3:1 cap would have greatly affected the *Rodman* case (19.32 ratio), cutting the plaintiff's punitive damages award from $250,000 to either $26,000 or $39,000, but not the mother-son *Critcher* fraud case (0.10 ratio). As with Category 5, no CAAP cases appeared in Category 6. There were also no federal cases in Category 6.

Compared to the categories already discussed, in terms of compensatory damages, Category 6: Dishonesty, had the lowest total and the lowest mean, but had the second highest median. For punitive damages, this category had the lowest total, the second lowest mean, and the second highest median ($130,000 compared to the median of $440,000 for Category 4: Gross Negligence). The mean punitives-to-compensatory ratio for this category was substantially higher than for other categories (9.71), but this was driven up by the 19.32 ratio in *Rodman*, and the overall mean ratio was 2.40 (less than Category 1: Violent Aggressors).

7. Category 7: Unsafe Products

> ***Masaki v. General Motors Corp.*** (Case S16): Stephen Masaki, a 28-year-old auto mechanic, was sent to fix a starter on a GM van. While Stephen was under the van removing a cable on the remote starter, the van jolted from Park and went into Reverse, crushing his head and rendering him a quadriplegic. His parents claimed emotional distress from seeing him in the hospital and loss of their son's consortium. Plaintiffs alleged that GM was aware of hundreds of deaths and injuries from the same PRNDL defect, yet failed to fix the problem or issue a warning. After forty-nine days of trial, a state court jury found Stephen 40% comparatively negligent, and GM 60% at fault. The total verdict included $5,284,000 in compensatory damages and a record (unreduced) punitive damages award of $11.25 million. On appeal, the Hawaii Supreme Court affirmed that punitive damages can be awarded in product liability cases, but adopted a clear and convincing standard for all Hawaii punitive damages awards, and remanded for a new award. The case ultimately settled for a confidential amount.

Only two cases fell into Category 7, both involving judgments against national products manufacturers, *Masaki* and *Tabieros* and in both cases the punitive damages judgments ($11.25 million and $52,000) were ultimately reversed by the Hawaii Supreme Court on appeal.[534] In, *Tabieros v. Matson*

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[534] *Masaki* was reversed by the Hawaii Supreme Court in 1989. *See supra* note 78. The judgment

Navigation Co., Inc. (S31), the injuries were as horrific as the severe injuries in *Masaki*. The defendants' defective dock straddler, a massive piece of equipment used to move shipping containers at the Honolulu docks, collided with the plaintiff's vehicle, crushing his legs and causing other severe injuries. A state court jury awarded the plaintiff $479,400 in compensatory damages and $52,000 in punitive damages (only against the product manufacturer).

In these two cases, the compensatory awards totaled $5,763,400, with a mean and median of $2,881,700 (Table 10). The punitive damages awards totaled $11,302,000, with a mean and median of $5,651,000. The punitive-to-compensatory ratios in these two state cases were 0.11 (*Tabieros*, S31) and 2.12 (*Masaki*, S16), resulting in a mean and median ratio of 1.15. The 2:1 cap (but not a 3:1 cap) would have reduced the *Masaki* case (2.12 ratio) by about $650,000 ($11.25 million to $10.6 million); the caps would not have affected the *Tabieros* case (0.11 ratio).

Compared to the other categories mentioned above, Category 7: Unsafe Products, had the third highest total compensatory awards awards, the second highest mean (slightly less than Category 4: Gross Negligence), and the highest median (ten times higher than the median of $282,750 in Category 4). For punitive damages, Category 7 had the highest total amount awarded ($11 million, about twice that of the next highest category, Violent Aggressors, which had twenty-three total cases compared to the two for Category 7); and the highest mean and median award (about seven times higher than the mean of $824,880 in Category 4: Gross Negligence, and thirteen times the median in that category). The mean ratio for Category 7 of 1.15 was lower than six of the categories, and the median of 1.15 was lower than only two other categories. The overall mean ratio was third highest.

No CAAP and no federal cases appeared in Category 7.

Thus, of the thirty-nine Hawaii state court punitive damages judgments, only two, or 5% of these judgements, involved products liability. When combined with the CAAP and federal categories, the percentage falls to 3% (2/63).

Tort reform proponents often claim that a primary reason for limiting or eliminating punitive damages verdicts is that they fall too heavily on the manufacturers of products and are, therefore, unduly burdensome on business

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against Clark Manufacturing in *Tabieros* was reversed by the Hawaii Supreme Court in 1997. *See supra* note 405 and Appendix B, § 7. Clark had lost an earlier appeal by plaintiffs to the Hawaii Supreme Court, which found that Clark should not have been granted summary judgment on the plaintiffs' punitive damages claim at the first trial. Tabieros v. Diaz, 827 P. 2d 1148 (Haw. 1992) (Mem. Op.).

and stifle innovation.[535] To respond to this criticism, Vidmar and Rose's Florida study examined the frequency of punitive damages in products liability cases. Vidmar and Rose concluded that, contrary to the popular claims, "with the exception of asbestos cases, punitive damages were almost never given in products liability cases."[536] Of the 225 Florida punitive damages verdicts they studied, only 16[537] were in products liability cases, about 7% of all verdicts.[538] The numbers, as indicated above, are similarly small for Hawaii: 5% of state punitive damages judgments and 3% of all such judgments studied. Further comparisons with the results of the Florida study are discussed in E, below.

8. Category 8: Reverse Punitive Damages

The last category of coded narratives involves three highly unusual cases where the defendant counterclaimed and won punitive damages. In one of these cases (*Vidmar v. Kan*, S24 a domestic violence case also reported in Category 1), both the plaintiff and defendant were awarded punitive damages ($7,500 for the plaintiff and $750 for the defendant). Another case involved a prominent trial of a university professor for sexual harassment claims by a student. In *Gretzinger v. University of Hawaii Professional Assembly* (F3), a female University of Hawaii student, Michelle Gretzinger, claimed that the defendant, her professor Ramdas Lamb, subjected her to unwelcome sexual advances, including sixteen rapes, and that he bribed other students into sexual relationships through his advisor position. Lamb counterclaimed. After a fourteen-day trial, a jury found in favor of Lamb, awarding him $40,000 in general damages, $12,750 in special damages, and $80,000 in punitive damages.

In these three cases, the compensatory awards totaled $453,053, with a mean of $151,017, and median of $300 (Table 11). The punitive damages awards totaled $80,751, with a mean of $26,917, and median of $750. The punitive-to-compensatory ratios in the three cases ranged from a low of 0.18 (*Gretzinger v. Lamb*, F3), to .33 (*Kikumoto v. HTH Corp.*, S36), to 2.5 (*Vidmar v. Kan*, S24), with a total mean ratio of 1.00 and median of .33. The 2:1 cap but not the 3:1 cap would have affected only the *Vidmar* case (reducing the award from $750 to $600), but not the other two cases.

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[535] *See, e.g., supra* notes 364-368 and accompanying text.

[536] Vidmar & Rose, *supra* note 71, at 487.

[537] *Compare* Vidmar & Rose, *supra* note 71, tbl. 2 (noting 20 products liability cases in which punitive damages were presented to the jury) *with* text, *id.* at 496 (explaining that awards were made in 16 of those 20 cases).

[538] *Id.* Table 2.

Kikumoto v. HTH Corporation (Case S36): In what plaintiff alleged as a whistleblowers' case, the plaintiff claimed he was wrongfully terminated for opposing defendant corporation's policies on race discrimination, and for drawing attention to building-code and worker-safety violations. The plaintiff told the defendant he was also substantially underpaid. The defendant HTH Corporation counterclaimed, contending the plaintiff had obtained confidential records, was extorting a salary increase, and had been justly terminated. The jury found for the defendant on all counts and awarded the defendant symbolic damages of $3.00 for the breaches and $1.00 in punitive damages.

These "reverse punitives" cases are so unusual that comparing them with cases in other categories is not illuminating. They do demonstrate, however, that punitive damages claims by plaintiffs can backfire, and that juries (and courts) will sometimes turn the tables on a misguided or unsympathetic plaintiff. Only in the *Gretzinger* case, however, was the reverse punitive damages award substantial ($80,000).

D. Tort Reform Rhetoric: Undue Burden on Certain Defendants?

A common complaint made by tort reformers is that the unfair burden of punitive damages falls most heavily on businesses, landowners, and medical professionals.[539] A review of the narratives in the Hawaii cases discussed above suggests that these criticisms lack substantial support.

Other than the seven cases mentioned in Category 2: Abusers of Power, in which private Hawaii businesses were sued as employers of the plaintiff (*e.g.*, for wrongful termination or sexual harassment) (11% of all judgments), businesses were held liable for punitive damages in only five of the sixty-three cases (8%).[540] In *Clawson v. Sears Roebuck & Co.* (S14), Sears unlawfully initiated a false arrest and was found liable for $20,000 in punitive damages (but was granted a motion for a new trial). In *Masaki v. General Motors Corp.* (S16), the punitive damages verdict for GM's defective van set a record at $11.25 million (but this was reversed on appeal). In *Tabieros v.*

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[539] Five cases in the study involved legal professionals as defendants for claims ranging from fraud, malpractice, and defamation (*see* Table 13, available on author's website: Critcher v. Critcher, S7; Rodman v. Appell, S21; Lessary v. Lessary, S22; Mohr v. Kaan, S30; and Locricchio v. Legal Services Corp. of Hawaii, F1), but punitive damages judgments against legal professionals never seem to be mentioned as an inspiration for tort reform.

[540] *See* Table 13 on author's website.

Matson Navigation Co., Inc. (S31), Clark Equipment was found 34% at fault and assessed punitive damages of $52,000 (also overturned on appeal).[541] In *Kim v. Nova International Hawaii Co., Ltd.* (S32), the defendant dba Maharaja nightclub was hit with punitive damages of $25,000 for failure to stop or intervene in a bar fight. Lastly, in *Mitchell v. Physicians Health Plan of Minnesota* (F2), Westin Hotels dba Mauna Kea Beach Hotel hotel was found 53% negligent to a hotel guest rendered a quadriplegic when it knew of 137 prior incidents at its beach (punitive damages totaled $3 million).

Of these five defendants, four were major national corporations (Sears, General Motors, Westin, and Clark Equipment) and one (Nova International Hawaii Co., Ltd.) was a Japanese company that purchased the large Waikiki nightclub in 1989.[542] Thus, although economic contributions of non-Hawaii-based corporations are undoubtedly important to Hawaii's economy, it cannot be said that "local Hawaii businesses" have been hit hard, or even touched, by punitive damages judgments during the study period for their business activities. On the other hand, local Hawaii businesseshave certainly been found culpable in the context of employee-employer discrimination cases (such as the $1.5 million punitive damages judgment in *Parnar*, as described in Part V C 2 above). This unusual disparity in the "business impact" of punitive damages, however, never seems to be explained in the public debate.

Hawaii "landowners," either individuals or businesses, were assessed punitive damages judgments in three cases (5%): *Kanehe v. Brisebois* (S6), where the defendant individuals and their farm, Wainiha Valley Farms, were all assessed punitive damages for their dog's attack on the plaintiff; *Chase v. State of Hawaii* (S23), a case in which the AOAO of the Whaler on Kaanapali Beach was assessed $440,000 in punitive damages for failure to warn of the dangerous shorebreak that injured the plaintiff visitor (where the AOAO knew of 20-22 similar incidents in front of the beachside property); and *Mitchell v. Physicians Health Plan of Minnesota* (F2), mentioned above, involving the Mauna Kea Hotel.[543]

Medical professionals were held liable for punitive damages in three judgments (5%): the two cases involving plastic surgeon Dr. McCurdy—*McCurdy v. Schlesinger*, S20, where he sued another Maui surgeon who had impugned his qualifications and forced him to relocate to Honolulu (winning an award of $50,000 in punitive damages) and *Ditto v. McCurdy*, S26, where

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[541] *See supra* note 535.

[542] For information on Nova, see State of Hawaii, Department of Business Economic Development and Tourism, *Selected Foreign Commercial Activities, 1954-1998, Japan (1988-1989), available at* http://www.hawaii.gov/dbedt/fia98/alpha-j88.html) (last accessed June 20, 2004).

[543] *See* Table 13 on author's web site.

Dr. McCurdy was sued by a breast surgery patient for malpractice and was hit with a $600,000 punitive damages judgment that he has, to date, successfully appealed multiple times on procedural grounds, although the appellate courts clearly agree with plaintiff on the merits.[544] In the only other medical professional case, *Hart v. Pierner* (C17), a chiropractor negligently adjusted plaintiff's back, causing her cervical injury. He had allegedly had been drinking and touched plaintiff inappropriately, leading to a $9,400 punitive damages award. Thus, only two claims actually involved medical malpractice, and in the only one with a major award, *McCurdy*, the plaintiff has to date not yet recouped any part of that punitive damages judgment more than ten years after the favorable judgment.

In short, the qualitative data on Hawaii punitive damages judgments do not support some of the most commonly made assertions by reform proponents about who is hit hardest by such awards. As discussed above, the typical defendant assessed a punitive damages verdict in Hawaii is not a private business, landowner, or medical professional but rather an individual violent aggressor or reckless/intoxicated driver. On the other hand, Hawaii juries, judges, and arbitrators have entered a handful of punitive damages judgments against some national and international corporations that do business in Hawaii for their business-related activities or products, but not against any businesses that might fairly be called "local Hawaii businesses." Local businesses have been hit with punitive damages, however, in their roles as employers in lawsuits won by harassed or wrongfully discharged employees. Awards have also been issued against a few Hawaii landowners and two medical professionals. These awards have tended to be much larger than those imposed on individuals, but several of the largest ones (*Masaki, Tabieros,* and, to date, *Ditto*) were successfully appealed by the corporate or professional defendants, nullifying the awards.

Those wishing to select the poster children for tort reform in Hawaii might be well served to examine the details of the actual judgments and the identities of the defendants, and whether such judgments actually were ever upheld or paid, before seeking the sympathy of legislators or the public. As the data from the case narratives shows, the tragic torts stories that form the bulk of the punitive damages judgments in Hawaii involved neither terribly appealing defendants nor compelling demonstrations of unfairness. To the contrary, the ordinary person might find -- as the juries, judges, and arbitrators did in these cases -- that the defendants in these cases well deserved the sting of a punitive damages award.

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[544] *See infra* Appendix B for a summary of the complex appeals in this case.

E. Comparisons to Vidmar and Rose's Florida Study

The Florida study by Vidmar and Rose is the only published study to date that similarly presents case narratives in punitive damages judgments sorted into categories in order to more deeply probe the question of what types of cases generate what types of punitive damages awards.[545] To compare the results of the two state studies,[546] some of the categories used by the Florida study were combined to more closely match the Hawaii categories (*e.g.*, the Florida premises liability and professional negligence cases were matched with the Hawaii gross negligence category). The Hawaii study did not use two of the categories used in the Florida study (workplace injuries and improper treatment of the dead) because there were no such reported Hawaii judgments, and the Florida study did not have the "reverse punitive damages" category included in the Hawaii study. Otherwise, the similarities in case groupings are more striking than the differences.

Comparisons of the data are, of course, quite difficult given the differences in: the periods of time studied, the court systems, the state doctrinal backgrounds, the number of judgments studied, total population, and myriad other factors.[547] Nevertheless, there are some interesting similarities. Focusing on punitive damages awards in the matched categories, for Category 1: Violent Aggressors (Hawaii, n=23)/Assaults (Florida, n=43), the median punitive damages award in Hawaii was $20,000, compared to the Florida median of $59,832. In Category 2: Abusers of Power (11)/Discrimination-Harassment (13), the median punitive damages award in Hawaii was $60,000, compared to $1,0320 in Florida. For Category 3: Drunk Drivers and Speeders (10)/Motor Vehicle Accidents (63), the Hawaii median was $9,570 compared to the Florida median of $21,579. For Category 4: Gross Negligence (5)/Premises Liability & Professional Negligence (29), the Hawaii median punitive damages award was $440,000 and the Florida median was $1,006,172. For Category 5: Mental and Physical Freedom(8)/Information Violations & False Imprisonment/Arrest(40), the Hawaii median was $57,500 and the Florida median was $139,814. In Category 6: Dishonesty(2)/Fraud, Contract Violations, Financial Damages(47), the Hawaii median was $130,000, compared to $318,055 in Florida. Finally, in the last comparable

[545] The 1999 study of Ohio products liability and medical malpractices cases uses a similar categorical technique, but does not focus on punitive damages awards. *See* Merritt & Barry, *supra* note 47, at 328-29.

[546] *See* Table 12, available on author's web site.

[547] The Hawaii study did not, for example, adjust the dollar values for inflation, as did the Florida study. This would tend relatively to overweight the value of earlier verdicts and the Hawaii verdicts for purposes of comparison.

category, Category 7: Unsafe Products(2)/Products Liability(20), the Hawaii median was $5,561,000, compared to the Florida median of $669,936.

Thus, in six of the seven categories, the median punitive damages award in Hawaii was substantially lower than the median punitive damages award in Florida. Only in the last category, unsafe products, did the Hawaii median exceed that of Florida, but the Hawaii median was based on only two cases, and in both of those cases (*Masaki* and *Tabieros*) the punitive damages verdict was ultimately reversed.

For Hawaii, the top three median awards categories were (in order) Category 7: Unsafe Products, Category 4: Gross Negligence, and Category 6: Dishonesty. For Florida, Discrimination/Harassment was the highest comparable category, followed by Professional Negligence, and then Products Liability. (Improper Treatment of the Dead had the highest median in Florida, $3 million, but there were no comparable Hawaii cases reported.) Thus, the two states were similar in sharing high median values in two out of three of these categories: Unsafe Products and Gross Negligence.

For Hawaii, the three lowest median categories were, Category 1: Violent Aggressors, Category 5: Mental and Physical Freedom, Category 3: Drunk Drivers and Speeders, and Category 1: Violent Defendants. For Florida, the three lowest median categories were Motor Vehicle Accidents (similar to Hawaii Category 3), Assaults (similar to Hawaii Category 1), and Information Violations (similar to part of Hawaii Category 5). Interestingly, the two states show near-complete overlap in these three low-end categories.

Comparing the Florida and Hawaii data suggests several observations relevant to the punitive damages debate. Even though punitive damages judgments due to unsafe products were a small percentage of the pool (3-5% in Hawaii, and 7% in Florida, as noted above), these cases generated the highest median award among all eight categories in Hawaii and the fourth highest median in Florida among the eleven categories used by the Florida study. On the other hand, while Professional Negligence generated a high median in Florida ($1 million) (n=12), the median in Hawaii was much lower ($304,700 when only the two medical malpractice cases are selected from Category 4). Although the Hawaii numbers are small, it can be said that punitive damages verdicts involving negligent, large, out-of-state corporations in Hawaii and negligent professionals in Florida are each state's respective "high end" punitive damages awards. Whether it is the verdicts themselves, the severity of the injury to the plaintiffs, the callous nature of defendants' behavior, or a geographical-cultural factor that "drives" the award is still, however, open to debate.

Both studies also examined the ratio of punitive damages awards to the

compensatory awards in the judgments covered during the study periods. For Category 1: Violent Agressors /Assaults, the median ratio in Hawaii was 0.84, compared to the Florida median ratio of 0.4. In Category 2: Abusers of Power/Discrimination-Harassment, the median ratio in Hawaii was 0.61, compared to 2.3 in Florida. For Category 3: Drunk Drivers and Speeders/Motor Vehicle Accidents, the Hawaii median ratio was .05, compared to the Florida median ratio of 0.1. For Category 4: Gross Negligence/Premises Liability & Professional Negligence, the Hawaii median ratio was 0.99, compared to a merged value of the two-component Florida median ratio of 1.5. Category 5: Mental and Physical Freedom/Information Violations & False Imprisonment/Arrest, the Hawaii median ratio was 1.75, compared to a merged value for Florida of 0.75. In Category 6: Dishonesty/Fraud, contract violations, financial damages, the Hawaii median ratio was 9.71, compared to 1.0 for Florida. Finally, in the last comparable category, Category 7: Unsafe Products/Products Liability, the Hawaii median ratio was 1.15, compared to the Florida median ratio of 0.8.

In three of the four categories, the Hawaii median ratio was higher than that of Florida. Hawaii experienced the highest ratio in Category 6: Dishonesty (which was ranked fourth among the Florida categories), while Florida's highest ratio was in the Discrimination/Harassment category (ranked sixth among the Hawaii categories). No meaningful relationship is evident from this comparison.

The hypothetical effect of a 3:1 or 2:1 cap on both states in each category yields an interesting result. Using the median values,[548] for Hawaii (combining all state and federal cases), the 3:1 cap or the 2:1 cap would affect in the aggregate only Category 6: Dishonesty. Using the mean values, a 3:1 cap would affect in the aggregate only Category 2: Abusers of Power, and Category 6: Dishonesty. A 2:1 cap would additionally affect Category 5: Mental and Physical Freedom, but no other category. For Florida, which provided only the median ratio for each category, a 3:1 cap would have affected only the category involving improper treatment of the dead (a category not relevant to the Hawaii study), but none of the comparable categories. A 2:1 cap would have affected only two of the eleven categories covered in the Florida study (the morbid one noted above, and the Discrimination/Harassment category).

Thus, in both states, the proposals to cap punitive damages using a ratio

[548] Using the median values provides a better indication of how the entire category would be affected, but masks the effect on individual cases that comprise the category. Thus, even though the median value for Category 1 shows no effect of a 2:1 or 3:1 cap on the category as a whole, 4-5 of the 23 individual cases would be affected (*see* Table 4, *infra*).

would affect primarily only two to three of the major categories of punitive damages judgment cases, with the commonality being Category 2: Abusers of Power and Florida's Discrimination/Harassment category. This comparison suggests that the burden of ratio caps may fall disproportionately on the plaintiffs in those cases that involve no physical, but high mental injury, typically a discrimination or harassment claim by an employee against an employer. In addition, as noted above, in Hawaii, eight of these ten cases in Category 2 involved a female plaintiff. Is a cap that has a highly disproportionate impact on women who have been subject to harassment or discrimination by their employers the end policy result desired by tort reformers? Caps in Hawaii would also have the most impact in cases involving violent defendants and dishonest defendants. On the other hand, drunk drivers and speeders would be the most protected from the impact of caps. Policy makers could, and should, consider the specific impacts of the blunt tool of caps in past judgments like these before enacting such a crude solution to the perceived problem of high punitive damages awards.

VI. CONCLUSION: RHETORIC, REALITY, AND INTEGRATED EMPIRICISM

An integrated empirical analysis of Hawaii's experience with punitive damages over the past seventeen years provides some new realistic insights into the national and local rhetoric surrounding the punitive damages debate. Four major contextual factors provide a fertile ground for high and frequent punitive damage awards in Hawaii. First, the State's political-social history is distinctly liberal, big-D Democratic, and supportive of individual rights. Second, modern tort law developments in Hawaii have been predominantly pro-plaintiff, and in many areas, have led the country in expanding victims' access to the tort law system. Third, Hawaii's punitive damages jurisprudence is one of the most expansive in the country. Aside from the adoption of the clear and convincing standard of proof in 1989, the Hawaii courts have broadly interpreted the purpose and application of punitive damages, and have almost uniformly endorsed jury awards using a relaxed standard of review. Fourth, the Hawaii Legislature has not, despite considerable pressure from tort reform proponents over the past two decades, adopted any specific restrictions on punitive damages awards. The relatively weak interest of the Hawaii Legislature in tort reform compared to other states reflects a strong plaintiffs' bar and a deep-seated resistance to measures that would restrict the tort remedies of Hawaii residents. These four factors, taken together, would suggest that Hawaii should have a very high rate of punitive damages awards and high award amounts. Indeed, these are exactly the

allegations made by proponents of tort reform and stated year after year in the preambles and hearings for proposed legislative restrictions on punitive damages. But these claims turn out not to be true.

The quantitative data derived from seventeen years of reports in *Personal Injury Judgments Hawaii* do not support these popular critiques of Hawaii's tort law system. After surveying 2,250 tort judgments and, in more detail, the 63 punitive damages judgments rendered in the Hawaii state courts, the CAAP system, and the Hawaii federal court, this article concludes that many of the most commonly held beliefs about punitive damages awards in Hawaii are not based on fact.

Contrary to popular opinion, the annual number of punitive damages judgments is "puttering along," even declining, and certainly not "skyrocketing" in Hawaii. The average annual rate of punitive damages judgments in the Hawaii state courts is 5.29%; the federal court rate was 3.53%; the combined state/CAAP rate was 3.18%; and CAAP had the lowest rate of 1.3%.[549] Viewed longitudinally, judgments are also not rapidly increasing. To the contrary, the number of punitive damages judgments over time averages only about two per year in state court. In five of the past seventeen years, the Hawaii state courts reported no punitive damages judgments. CAAP awards per year have never exceeded three, and have been either one or zero in eleven of the fifteen years studied.

Punitive damages awards are "moderately often" but not "routinely" requested in Hawaii. Surprisingly, the highest mean annual request rate for punitive damages (43%) found in the study occurred in federal not state court. In state court, in those cases that resulted in judgment, plaintiffs requested punitive damages about 37% of the time, substantially higher than the 15% annual mean for CAAP, but in less than one-third of the reported judgments when state and CAAP cases are combined.[550] The trend over time in the rate of requests is downward.

Hawaii plaintiffs are not usually successful on their requests for punitive damages. In cases that went to judgment, plaintiffs had a mean annual success rate (an award of punitive damages in the reported judgments where a request was made) of 13.65% in state court, compared to 8.39% in CAAP, and 6.6% in federal court.[551] This success rate appears to be much lower than that uncovered in a similar study of Florida punitive damages judgments. Even winning plaintiffs in Hawaii face long odds on their punitive damages

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[549] *See supra* Part IV C 1.
[550] *See supra* Part IV C 2.
[551] *See supra* Part IV C 3.

claims. In cases where plaintiffs prevailed at judgment, they won punitive damages only 12.19% of the time in state court, in 5.49% of the combined state/CAAP cases, about 6.62% of the time in federal court, and 1.60% in CAAP.[552] In short, in Hawaii, for state tort cases that go to judgment, winning plaintiffs receive punitive damages in approximately 1 out of 18 of their successful cases, lower than the comparative national rates of success.

The amount of Hawaii punitive damages awards do not appear to be grossly excessive as often claimed. The mean state award was about the same in federal and state court—$552,457 and $536,429, but much lower in CAAP ($21,780)—with a total of $21.5 million in state punitive damages awards, about 5.7 times the amount awarded in federal court, and about fifty-eight times the amount awarded by CAAP.[553] The median awards were, however, much lower for each forum, indicating a handful of high awards but a larger base of more modest awards. The Hawaii median award amounts—$88,500 for state court, $5,000 for CAAP, and $0 for federal court—fell within the national range found in comparative studies. In Hawaii, only three of the thirty-nine total state court punitive damages awards (approximately 8%) exceeded $1 million, the same rate as found by two national studies. Two of these three high awards were reviewed by the Hawaii Supreme Court, which upheld one (*Parnar*, $1.5 million) and reversed the largest one (*Masaki*, $11.25 million).

When the "proportionality" of punitive damages judgments in Hawaii is viewed in terms of the relationship between the compensatory and the punitive awards, the study results indicated a mean annual exceedence rate of 34.36% in state court cases, 23.33% in CAAP cases, and 11.76% in federal court cases.[554] Thus, in Hawaii, the amount of punitive damages usually does not exceed the compensatory damages award. In terms of the ratio of punitive damages to compensatory damages, the state courts had the highest mean of a 3.03 (calculated as a mean of individual cases compared to 1.11 as an overall mean), compared to .894 for CAAP, and .55 for the federal courts. When we consider individual judgments instead of the mean, a 3:1 cap would have affected the awards in 43% of the federal cases, 20% of the state court cases, and 12% of the CAAP cases. A stricter 2:1 cap would have additionally affected only 8% more of the state cases.

Even though it would have less impact in state court than in federal court, a state ratio cap would limit some (but not all) of the larger verdicts. If the

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[552] *See supra* Part IV C 4.
[553] *See supra* Part IV C 5.
[554] *See supra* Part IV C 6.

often-proposed flat cap of $250,000 were adopted, it would have affected 21% of the state judgments, none of the CAAP judgments, and 29% of the federal judgments, resulting (presumably as intended) in a significant reduction in punitive damages totaling $18,175,974.

Such formulaic reform is a blunt instrument, dampening punitive damages judgments in cases with no or low physical injury but high mental harm or publicly injurious conduct, a disproportionate impact that should be considered in the debate. As demonstrated in the Florida and Hawaii studies, the different caps can have very disparate impacts on specific cases and may limit recovery in cases with unusually compelling facts. Some of the kinds of cases that would be hurt most by caps would be cases involving female employees winning lawsuits against employers, lawsuits by individuals hurt by violent defendants, and plaintiffs injured at the hands of dishonest defendants. On the other hand, drunk drivers and speeders would be the most protected from the impact of caps. These consequences should be considered by policymakers while considering such reform.

Should the decisionmaking on punitive damages awards be taken away from Hawaii juries and become the exclusive province of judges? When used to compare the mean awards for juries, judges, and arbitrators, the data indicate that juries do award substantially higher amounts (about sixteen times higher) of punitive damage judgments than either judges or arbitrators, but the median award of juries is only 1.3 times higher than of judges, and four times higher than of arbitrators.[555] The study suggested, however, that the difference needs to be considered in light of the different kinds of cases that end up in front of juries. Juries tended to hear the more complex severe injury cases, while judges tended to have shorter and "easier" cases involving defaulting defendants or admissions of liability. By definition, CAAP arbitrators hear the lowest value cases, but these non-jury attorney-arbitrators have also issued many punitive damages awards, usually small amounts but also up to $100,000 (*DuPont v. Pichay*, C8, in favor of police officer wounded by an automatic weapon). Moreover, given the existing system of trial court review of jury awards, it is not clear whether removing punitive damages awards from jury decisionmaking would make a substantial difference in the amounts awarded.

Thus, the quantitative analysis of the data from the Hawaii tort and punitive damages judgments creates a portrait of punitive damages in Hawaii that provides little or no support for some of the most commonly asserted claims about the infirmities of the punitive damages award system. Viewing

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[555] *See supra* Part IV C 7.

the data in light of the macro trends in Hawaii tort filings, population, and economic data strengthens this conclusion.[556] Over the study period, despite an overall increase in tort filings and rise in population, there has been a general decline over time in per capita tort filings, the number of tort judgments, requests for punitive damages, and punitive damages judgments. Moreover, Hawaii has experienced a distinctive period of "tort litigation decline" beginning in approximately 1995 and evident through the final years of the study. From this macro perspective, the trends in the Hawaii punitive damages data appear even more subdued, and even dull.

Similarly, qualitative analysis of the stories behind Hawaii's punitive damages awards indicates that the types of cases that result in such awards are not the typical "poster children" of the national tort reform movement.[557] When the Hawaii cases are categorized, the results indicate that the predominant type of cases in which punitive damages were awarded in Hawaii involved Violent Agressors (twenty-three cases, or 37% of the total judgments); Abusers of Power (eleven cases, or 17%); Reckless and Intoxicated Drivers (ten cases, 16%); and Offenses Against Mental and Physical Freedom (eight cases, 13%). Together, these cases constituted 83% of all punitive damages judgments, typically involved individuals suing individuals, and should be regarded as the "typical" story of punitive damages cases in Hawaii.

In contrast, the commonly used examples of punitive damages gone awry—medical malpractice and products liability—represent very small proportions of the total judgment pool in Hawaii. Interestingly, the most common type of case involving a punitive damages judgment against a local Hawaii business results from employment discrimination, where the vast majority of the victims are women. In the non-employment context, non-local Hawaii businesses (four mainland corporations and one Japanese company) were held liable for punitive damages in only five of the sixty-three cases (8%). Hawaii "landowners," either individuals or businesses, were assessed punitive damages judgments in three cases (5%), and Hawaii medical professionals were held liable for punitive damages in three cases (5%), only two of which involved malpractice. On the one hand, it is true that Hawaii juries, judges, and arbitrators have entered some large awards against Hawaii businesses, landowners, and medical professionals. On the other hand, when the tragic facts and appellate history of these cases is examined, they do not appear to be the kinds of cases with which to raise the red flag of punitive

[556] *See supra* Part IV D.
[557] *See supra* Part V.

damage reform. A prime example is the judgment involving the painful multiple botched surgeries suffered by a female plaintiff because of the medical malpractice of defendant Dr. McCurdy (*see supra* Part V C 4). Although the jury's $600,000 punitive damages award was overturned by the Hawaii Supreme Court for procedural reasons (and is still, apparently, unpaid pending retrial by the defendant who filed for bankruptcy after the verdict), the Court went to some length to condemn the defendant's unprofessional misdeeds.[558] Moreover, in an earlier case, McCurdy himself sought and won $350,000 in punitive damages (reduced by the judge to $50,000) against a fellow physician for defamation (*McCurdy v. Schlesinger*, Case S20), undercutting the credibility of any protestations on his behalf against the "unfair" use of punitive damages.

Comparing the qualitative portion of the Hawaii study to similar categorical analysis of Florida verdicts suggests some notable patterns in awards.[559] In six of the seven comparable categories, the median punitive damages award in Hawaii was substantially lower than the median punitive damages award in Florida. The two states shared high median values in two out of three of these categories, Unsafe Products and Gross Negligence, and in the former category, the Hawaii median exceeded that of Florida; however, this was based on punitive damages judgments in only two Hawaii cases, both of which were reversed on appeal. When the two state studies were compared in terms of the potential impacts of ratio caps, in both states, only two to three of the major categories of punitive damages judgment cases would be affected, with the commonality being Hawaii's Abusers of Power and Florida's Discrimination/Harassment categories typically involving a claim by an employee against an employer and, in Hawaii at least, predominantly female plaintiffs. If this impact were considered, ratio caps might be a less attractive "solution" to high punitive damages awards. As in other areas of the analysis, the more closely the data are examined, the more the results appear to contrast with the popular rhetoric of tort reform.

In conclusion, the Hawaii study attempted to create a new, more accurate picture of the entirety of one state's experience with punitive damages judgments. Like a mosaic, when the fragmented pieces of data are cohesively organized and presented, new perspectives emerge that are not accessible when the viewer either stands too close or too far from the detail. Using the many-layered contexts of Hawaii's jurisprudential, doctrinal, and legislative

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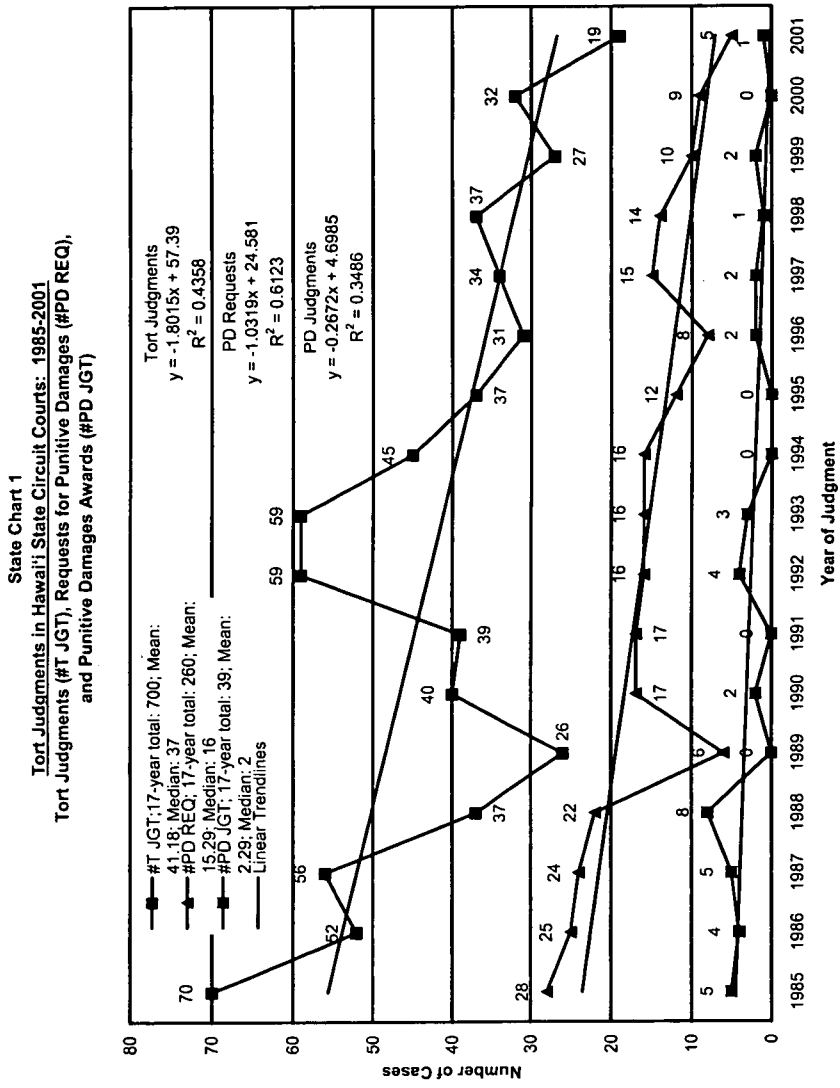
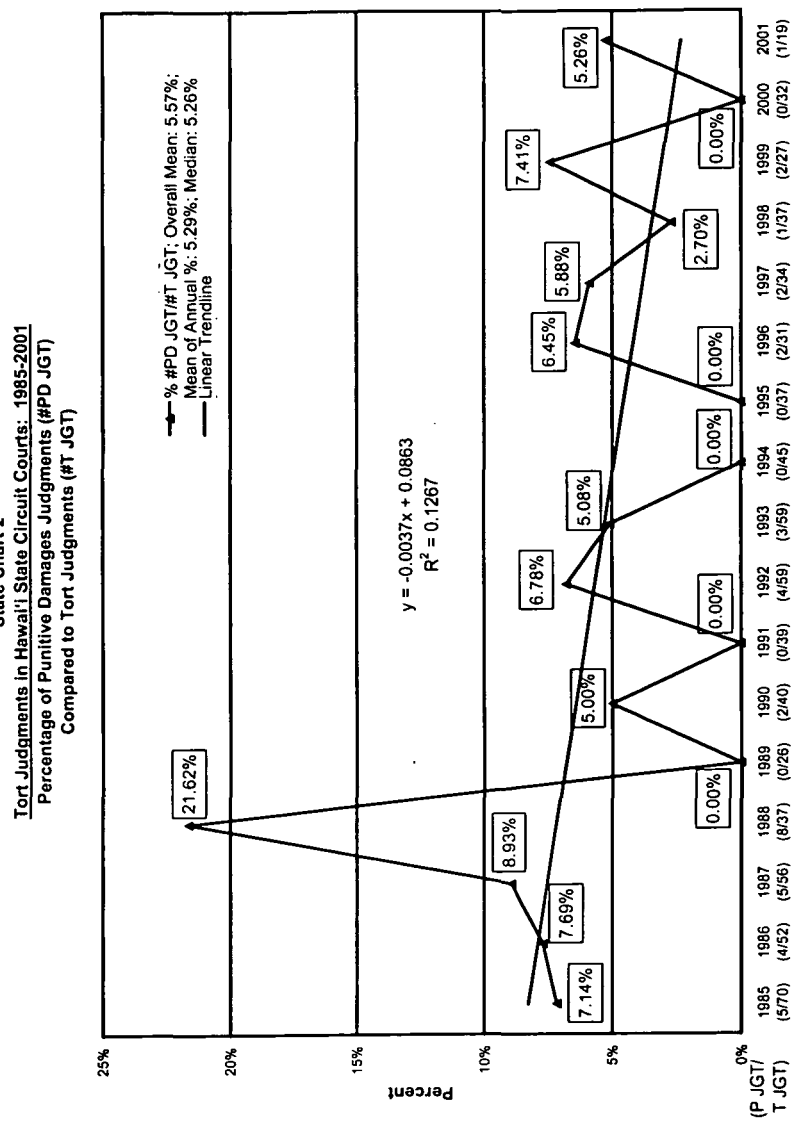
[558] *See Ditto* case narrative *infra* Appendix B.

[559] *See supra* Part V E.

history, together with the rich quantitative and qualitative data gathered from all of the 2,250 Hawaii tort judgments over a seventeen-year period, empiricism is merged with narrative, law, and real life. Complete integration of the available, excavated, and sifted data in the complex and constantly changing world of tort law is an almost impossible task, yet this article suggests the effort is worthwhile and offers a framework for this new kind of empirical approach. If those most involved in the ongoing national and state policy debate over punitive damages are willing to probe the complexities of a more comprehensive range of information than is usually considered on this issue, then this kind of approach can help bridge the communication gap between the vigorous ongoing research of the legal academy and the other equally important considerations of the legislative participants in the punitive damages polemic. Through a more rational discussion, agreement perhaps can be found on how best to modify the tort system. That discussion should be grounded on the two areas of apparent consensus among the warring factions: first, that punitive damages are an extreme remedy best suited for extreme torts, and second, that reality and not rhetoric should be the foundation for any future changes in tort law policy, in Hawaii and nationwide.

CHARTS

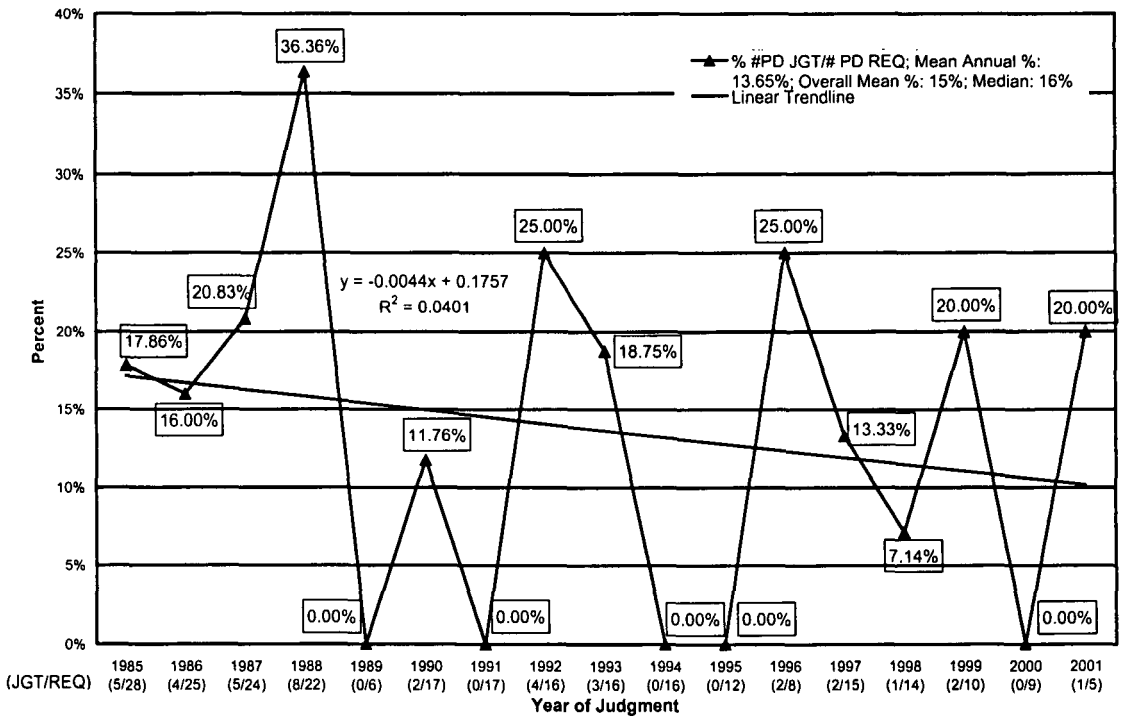

State Chart 1
Tort Judgments in Hawai'i State Circuit Courts: 1985-2001
Tort Judgments (#T JGT), Requests for Punitive Damages (#PD REQ), and Punitive Damages Awards (#PD JGT)
#T JGT;17-year total: 700; Mean: 41.18; Median: 37
#PD REQ; 17-year total: 260; Mean: 15.29; Median: 16
#PD JGT; 17-year total: 39; Mean: 2.29; Median: 2
Linear Trendlines
Tort Judgments
y = -1.8015x + 57.39
R² = 0.4358
PD Requests
y = -1.0319x + 24.581
R² = 0.6123
PD Judgments
y = -0.2672x + 4.6985
R² = 0.3486
Number of Cases
Year of Judgment
1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001


State Chart 2
Tort Judgments in Hawai'i State Circuit Courts: 1985-2001
Percentage of Punitive Damages Judgments (#PD JGT)
Compared to Tort Judgments (#T JGT)
% #PD JGT/#T JGT; Overall Mean: 5.57%;
Mean of Annual %: 5.29%; Median: 5.26%
Linear Trendline
y = -0.0037x + 0.0863
R² = 0.1267
Percent
25%
20%
15%
10%
5%
0%
21.62%
8.93%
7.69%
7.14%
0.00%
5.00%
6.78%
0.00%
5.08%
0.00%
6.45%
0.00%
5.88%
2.70%
7.41%
0.00%
5.26%
(P JGT/ T JGT)
1985 (5/70)
1986 (4/52)
1987 (5/56)
1988 (8/37)
1989 (0/26)
1990 (2/40)
1991 (0/39)
1992 (4/59)
1993 (3/59)
1994 (0/45)
1995 (0/37)
1996 (2/31)
1997 (2/34)
1998 (1/37)
1999 (2/27)
2000 (0/32)
2001 (1/19)
Year of Judgment

State Chart 3

Tort Judgments in Hawai'i State Circuit Courts: 1985-2001

Percentage of Punitive Damages Judgments (#PD JGT) Compared to Requests for Punitive Damages (#PD REQ)

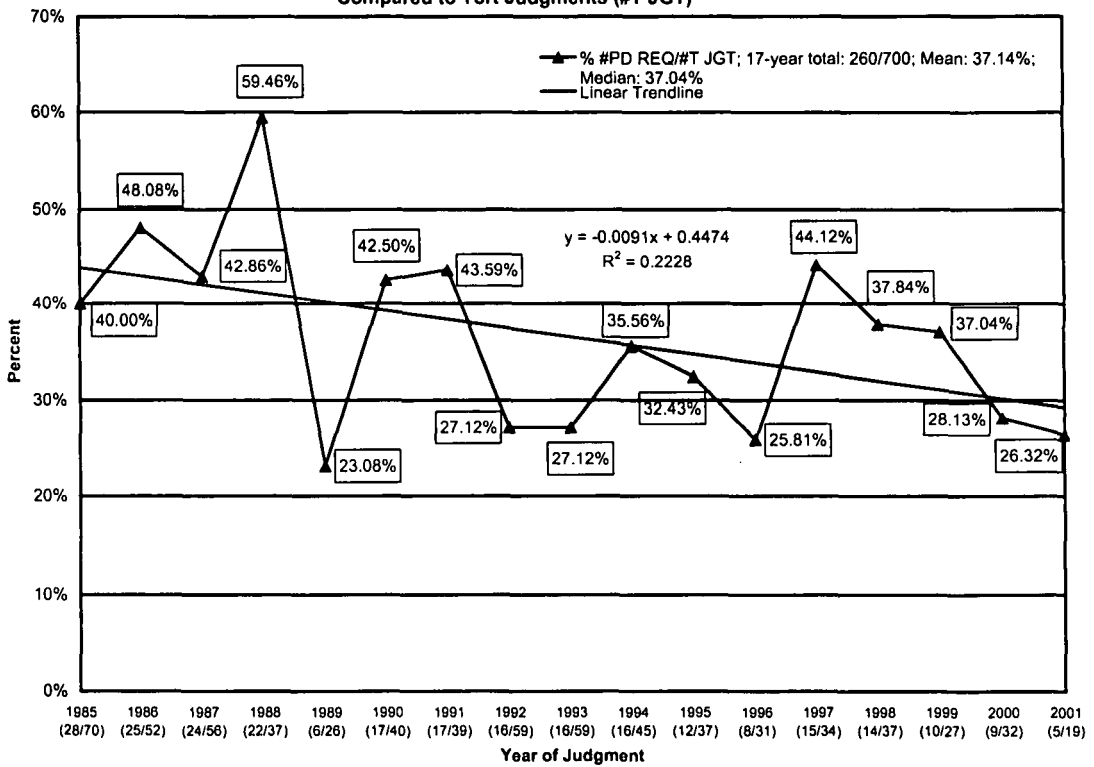


State Chart 4

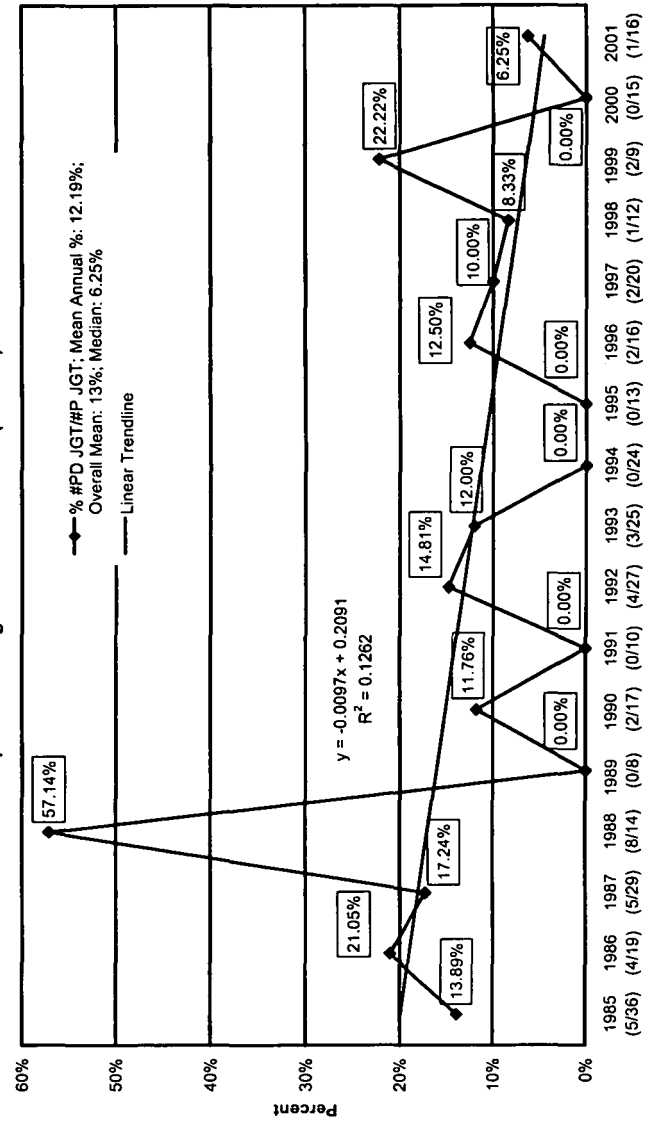
Tort Judgments in Hawai'i State Circuit Courts: 1985-2001

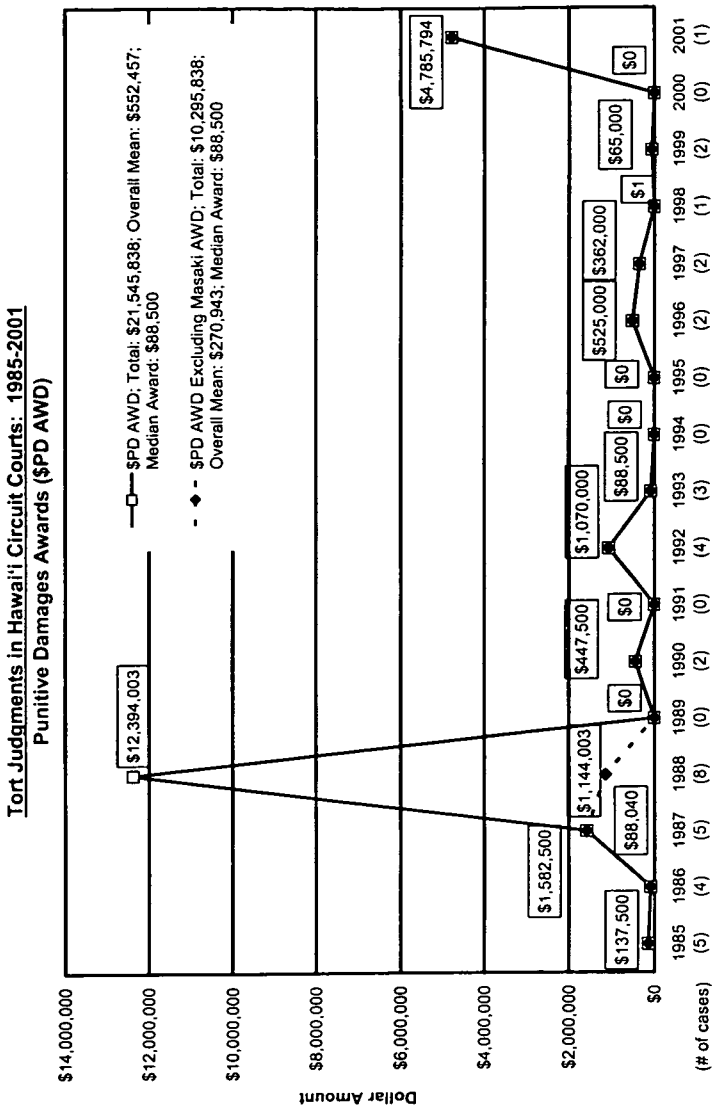
Percentage of Requests for Punitive Damages (# PD REQ)

Compared to Tort Judgments (#T JGT)



State Chart 5:
Tort Judgments in Hawai'i State Circuit Courts: 1985-2001
Percentage of Punitive Damages Judgments (#PD JGT) Compared to Judgments for Plaintiffs (#P JGT)

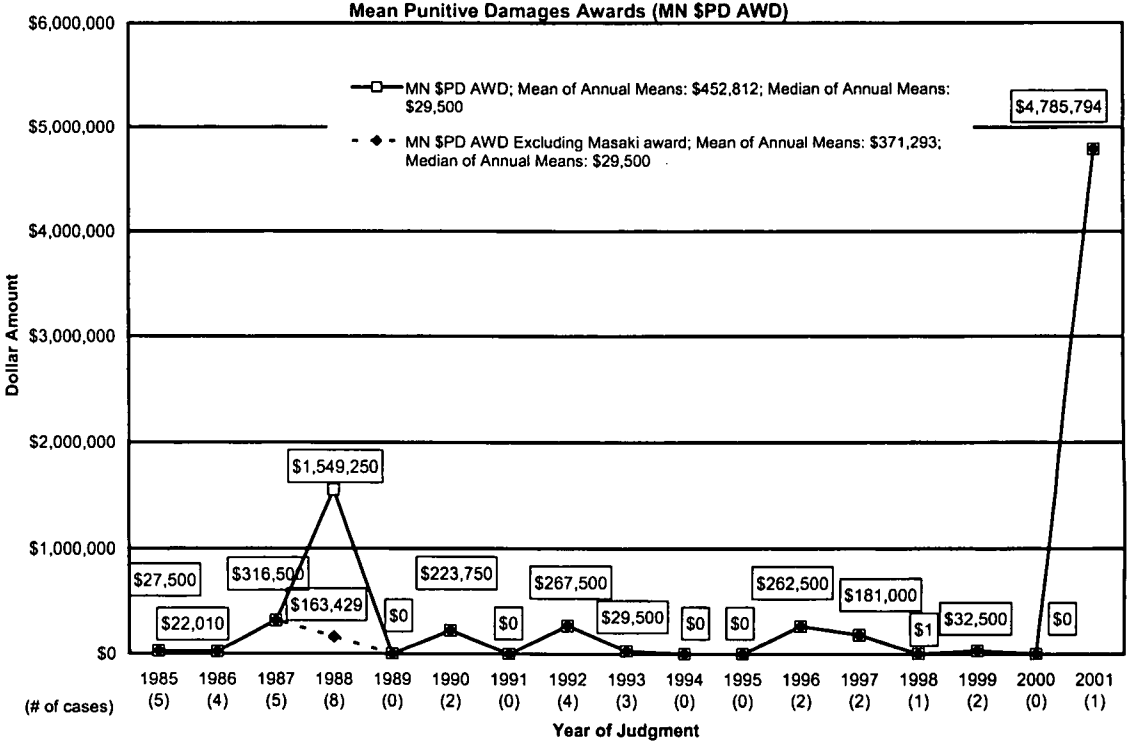



State Chart 6:
Tort Judgments in Hawai'i Circuit Courts: 1985-2001
Punitive Damages Awards ($PD AWD)
$PD AWD; Total: $21,545,838; Overall Mean: $552,457; Median Award: $88,500
$PD AWD Excluding Masaki AWD; Total: $10,295,838; Overall Mean: $270,943; Median Award: $88,500
Dollar Amount
$14,000,000
$12,000,000
$10,000,000
$8,000,000
$6,000,000
$4,000,000
$2,000,000
$0
$12,394,003
$4,785,794
$1,582,500
$1,144,003
$447,500
$1,070,000
$525,000
$362,000
$137,500
$88,040
$88,500
$65,000
$0
$1
1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001
(# of cases) (5) (4) (5) (8) (0) (2) (0) (4) (3) (0) (0) (2) (2) (1) (2) (0) (1)
Year of Judgment

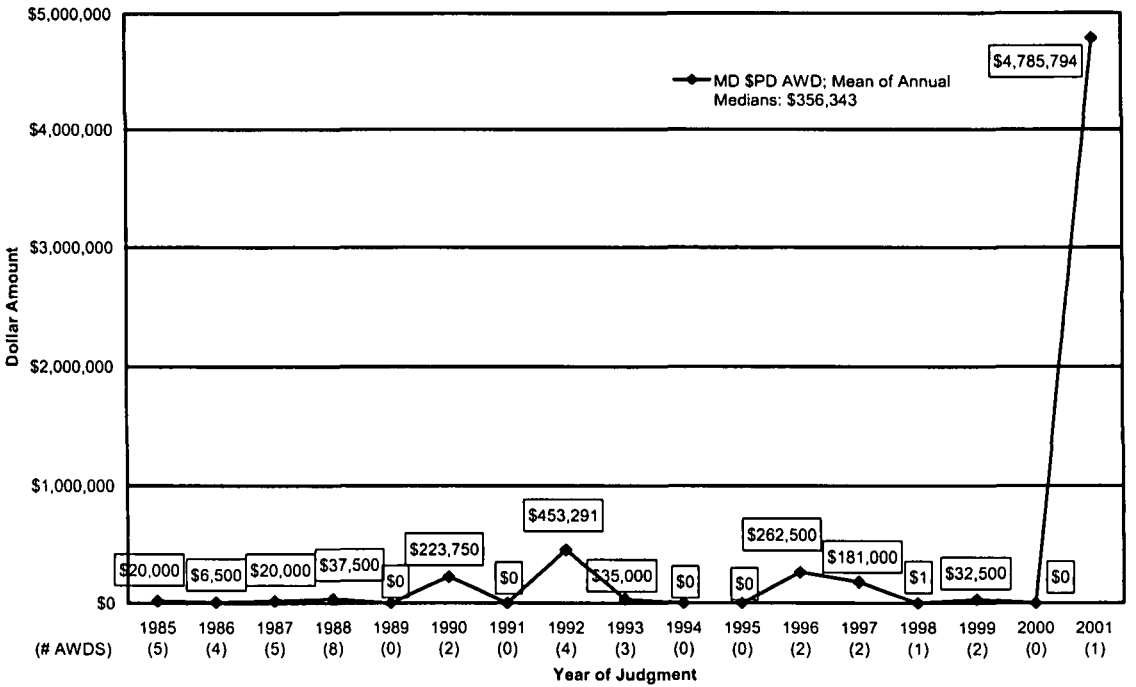
State Chart 7

Tort Judgments in Hawaii State Circuit Courts: 1985-2001

Mean Punitive Damages Awards (MN $PD AWD)



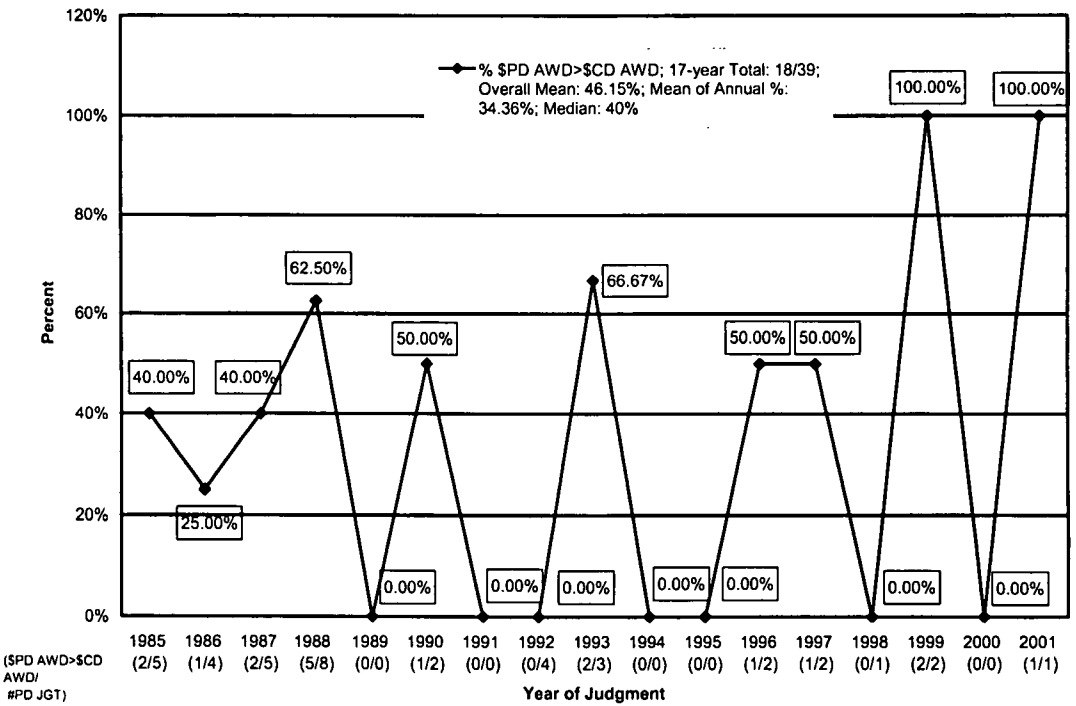
State Chart 8
Tort Judgments in Hawai'i State Circuit Courts: 1985-2001
Median Punitive Damages Judgments (MD $PD AWD)

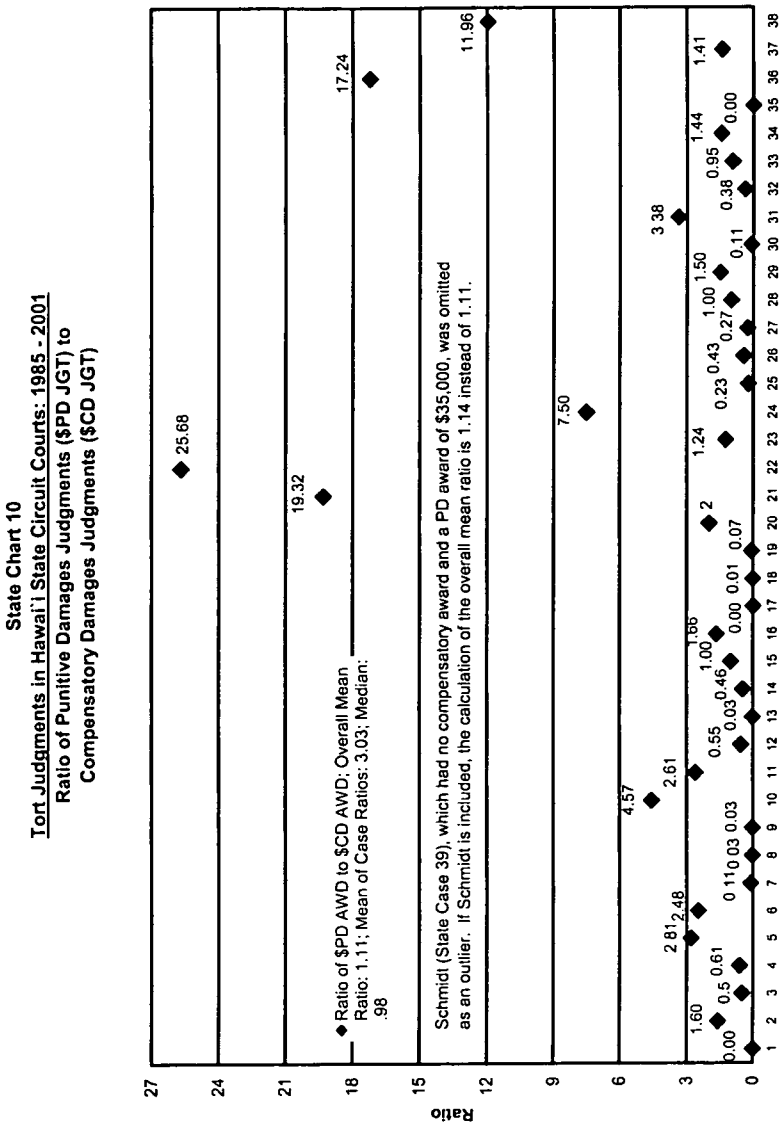


State Chart 9

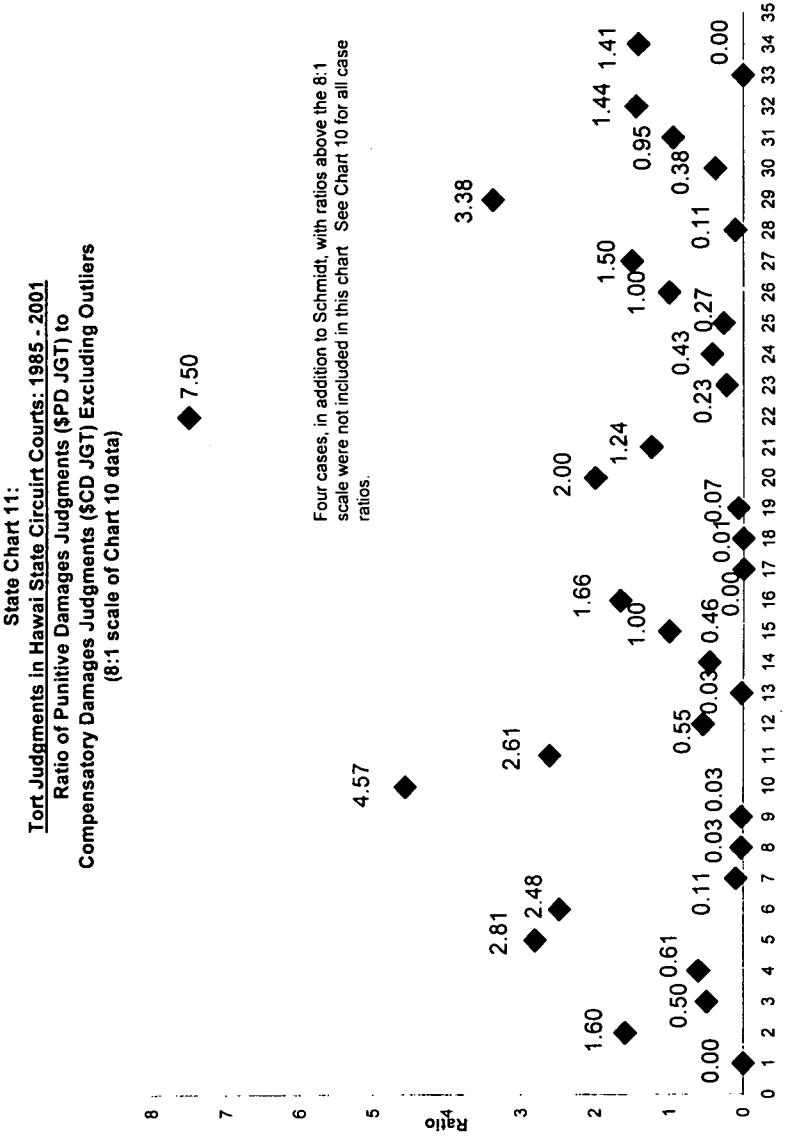
Tort Judgments in Hawai`i State Circuit Courts: 1985 - 2001

Percentage of Judgments Where the Punitive Damages Award Exceeded the Compensatory Damages Award ($PD AWD>$CD AWD)





Schmidt (State Case 39), which had no compensatory award and a PD award of $35,000, was omitted as an outlier. If *Schmidt* is included, the calculation of the overall mean ratio is 1.14 instead of 1.11.

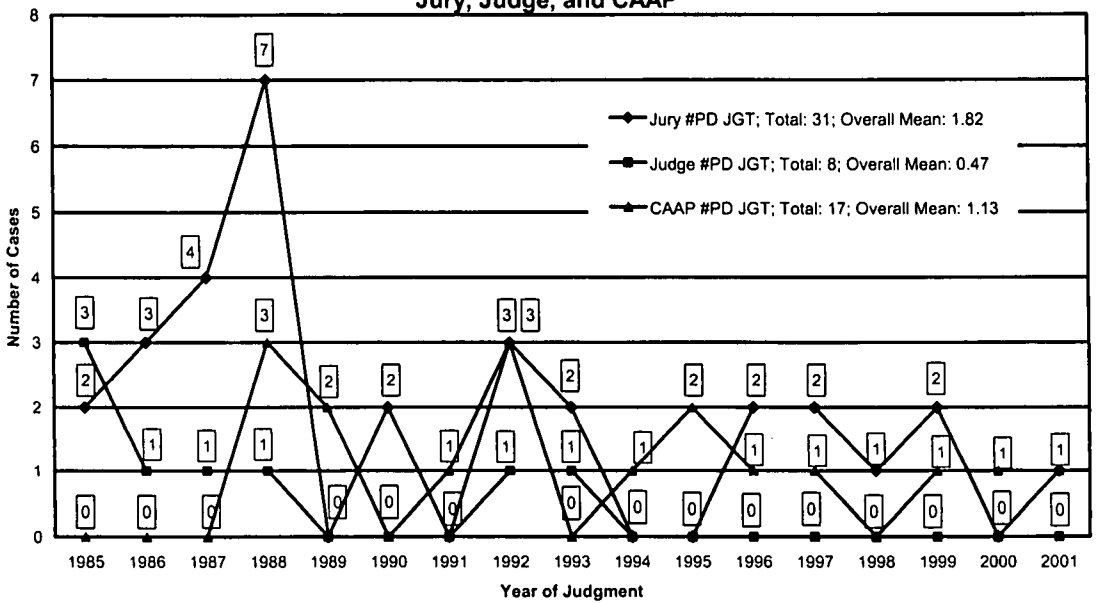


Four cases, in addition to *Schmidt*, with ratios above the 8:1 scale were not included in this chart. See chart 10 for all case ratios.

State Chart 12

Tort Judgments in Hawai'i State Circuit Courts: 1985 - 2001

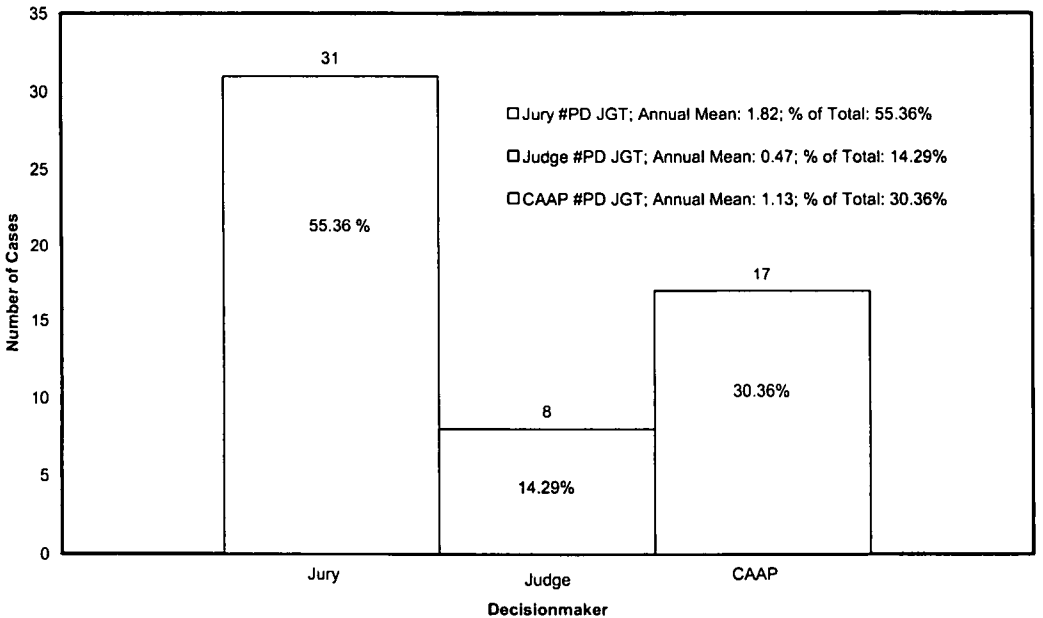
Punitive Damages Judgments (#PD JGT) by Decisionmaker: Jury, Judge, and CAAP



State Chart 13

Tort Judgments in Hawai`i State Circuit Courts: 1985 - 2001

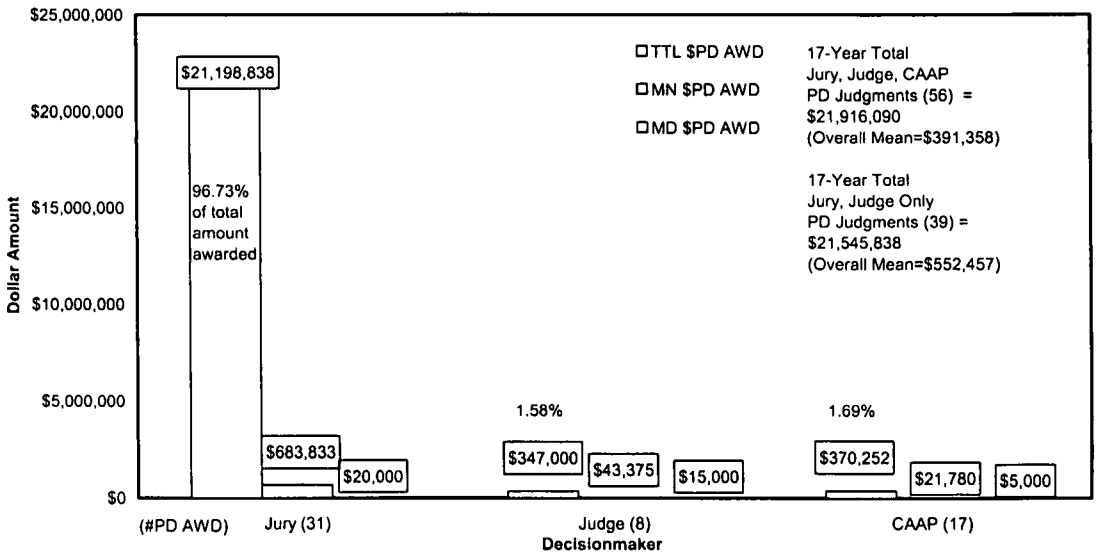
Total and Percentage of Punitive Damages Judgments (#PD JGT), by Decisionmaker: Jury, Judge, CAAP



State Chart 14

Tort Judgments in Hawai`i State Circuit Courts: 1985 - 2001

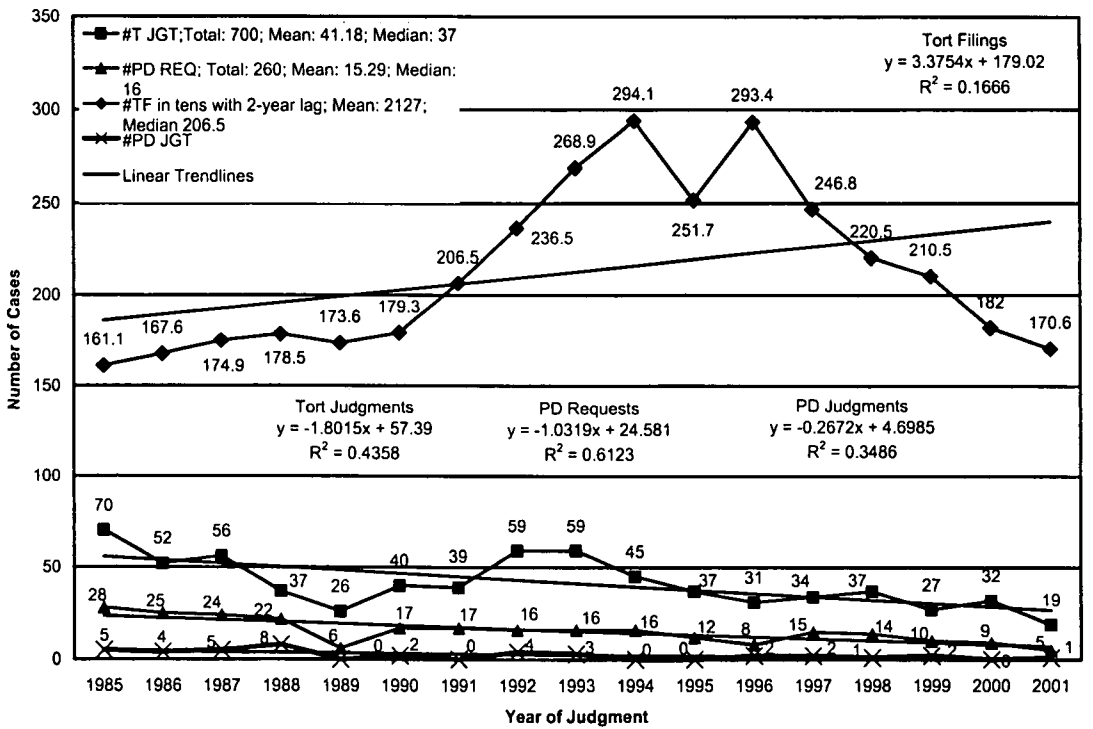
Total (TTL $PD JGT), Mean (MN $PD JGT), and Median (MD $PD JGT) Punitive Damages Judgments, by Decisionmaker: Jury, Judge, CAAP



State Chart 15

Tort Judgments in Hawai'i State Circuit Courts: 1985-2001

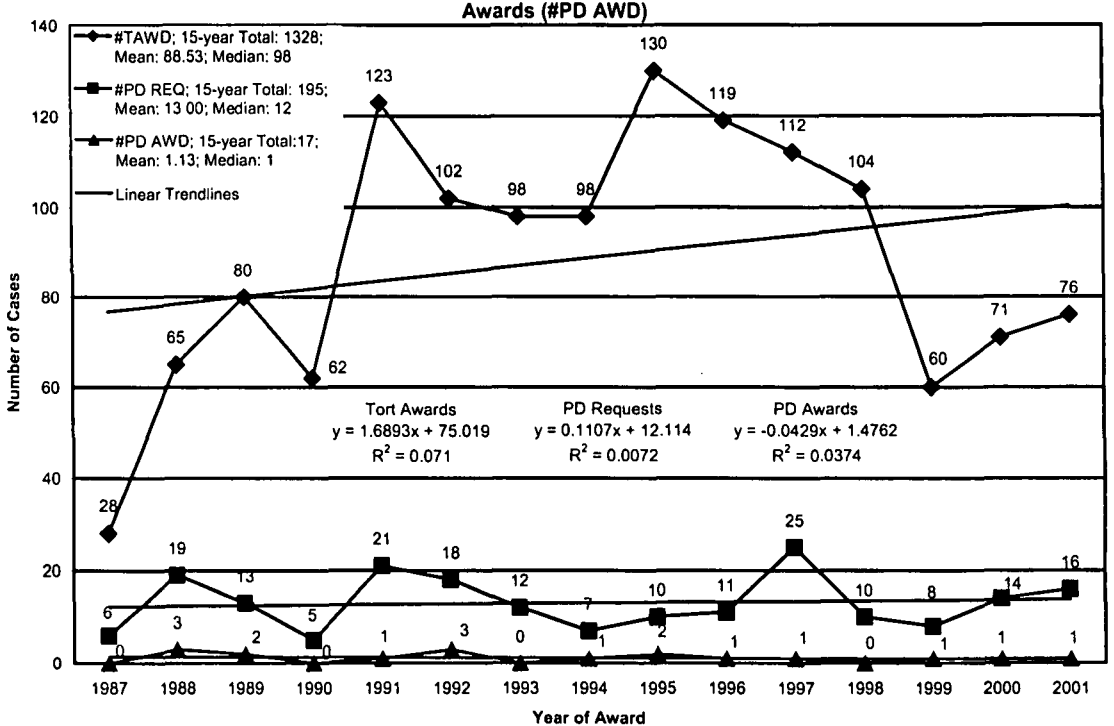
Tort Filings (#TF), Tort Judgments (#T JGT), Requests for Punitive Damages (#PD REQ), and Punitive Damages Awards (#PD JGT)

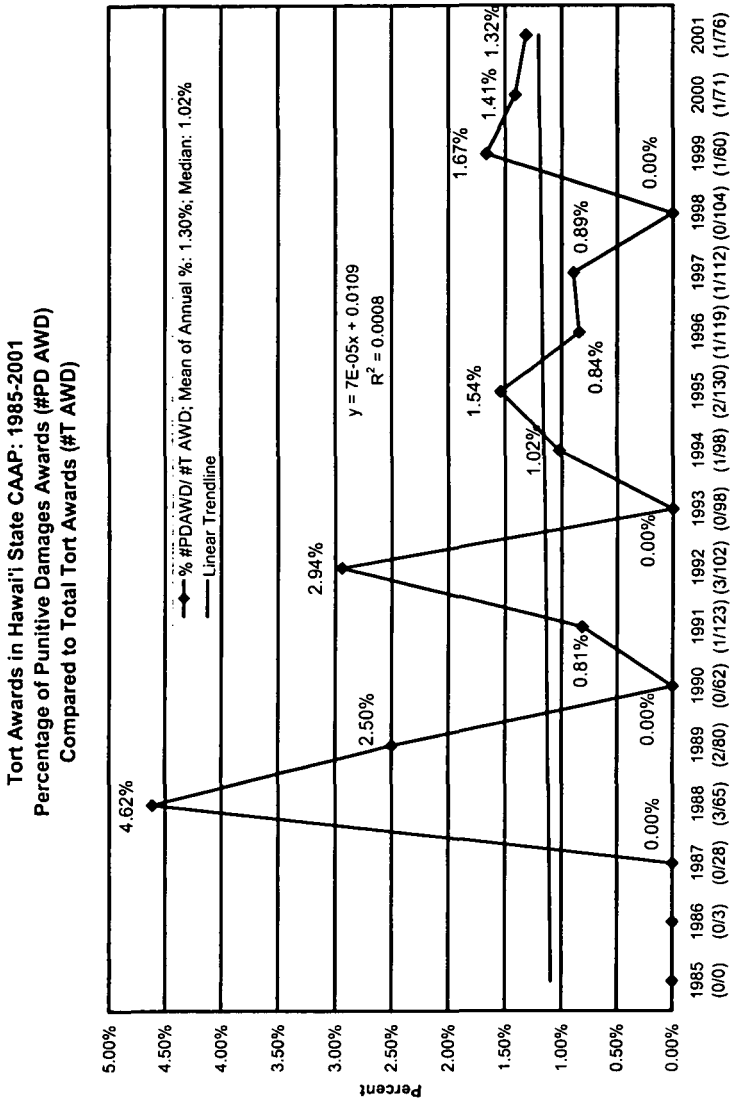


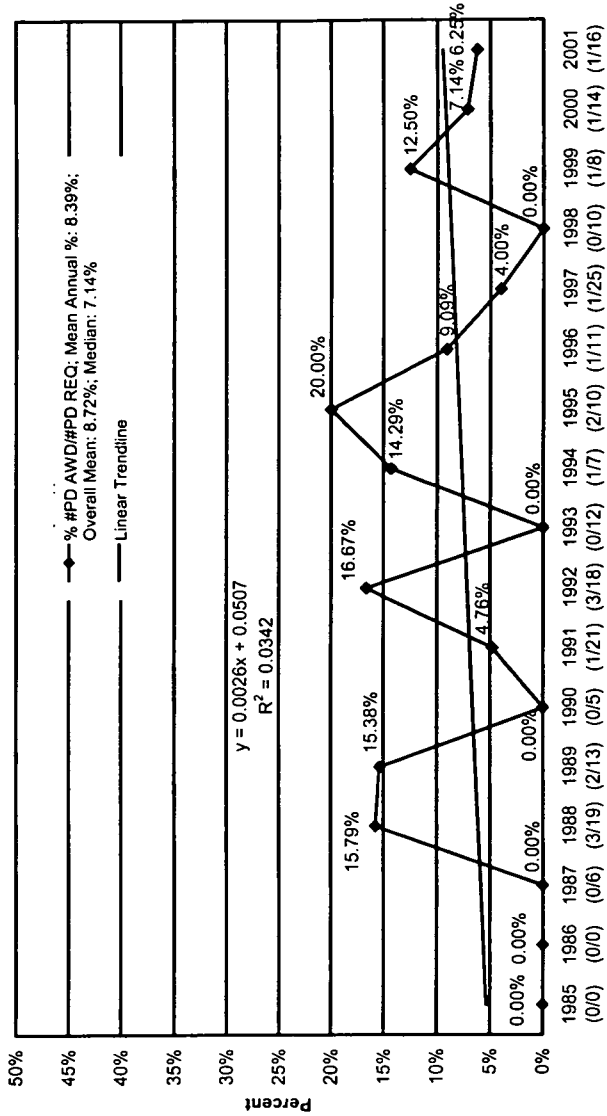
CAAP Chart 1

Tort Awards in Hawai'i State CAAP: 1985-2001

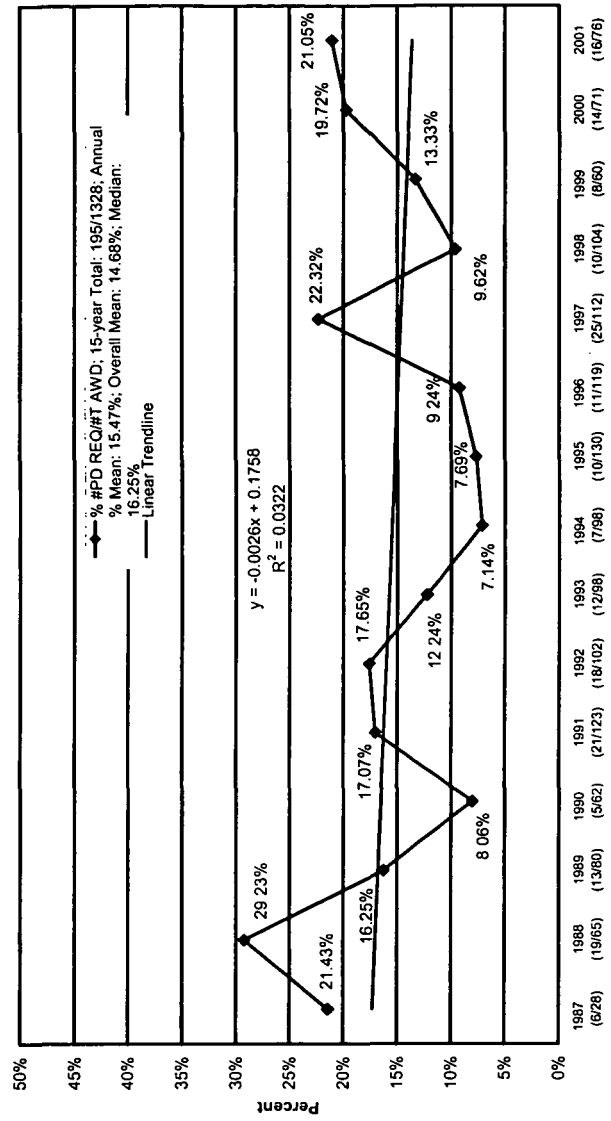
Tort Awards (#T AWD), Requests for Punitive Damages (#PD REQ), and Punitive Damages Awards (#PD AWD)



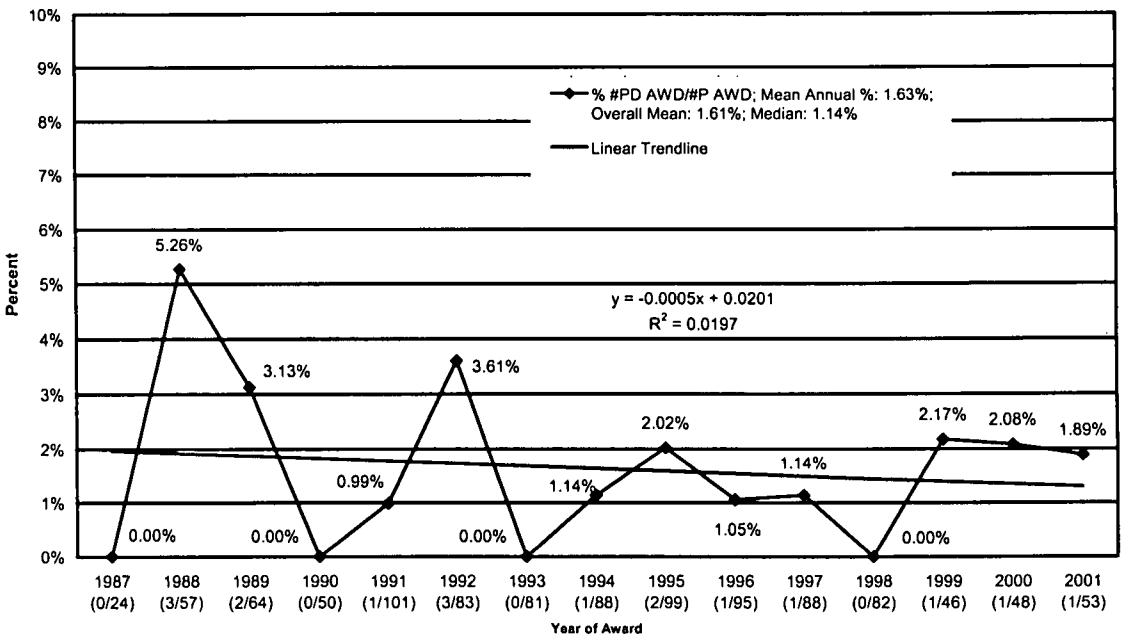

CAAP Chart 2:
Tort Awards in Hawai'i State CAAP: 1985-2001
Percentage of Punitive Damages Awards (#PD AWD)
Compared to Total Tort Awards (#T AWD)
% #PDAWD/ #T AWD; Mean of Annual %: 1.30%; Median: 1.02%
Linear Trendline
y = 7E-05x + 0.0109
R² = 0.0008
Percent
Year of Award
5.00%
4.50%
4.00%
3.50%
3.00%
2.50%
2.00%
1.50%
1.00%
0.50%
0.00%
4.62%
0.00%
2.50%
0.00%
2.94%
0.81%
0.00%
1.02%
1.54%
0.84%
1.67%
0.89%
1.41%
1.32%
0.00%
1985 (0/0)
1986 (0/3)
1987 (0/28)
1988 (3/65)
1989 (2/80)
1990 (0/62)
1991 (1/123)
1992 (3/102)
1993 (0/98)
1994 (1/98)
1995 (2/130)
1996 (1/119)
1997 (1/112)
1998 (0/104)
1999 (1/60)
2000 (1/71)
2001 (1/76)


CAAP Chart 3
Tort Awards in Hawaii State CAAP: 1985-2001
Percentage of Punitive Damages Awards (#PD AWD)
Compared to Requests for Punitive Damages (#PD REQ)
% #PD AWD/#PD REQ; Mean Annual %: 8.39%;
Overall Mean: 8.72%; Median: 7.14%
Linear Trendline
y = 0.0026x + 0.0507
R² = 0.0342
Percent
50%
45%
40%
35%
30%
25%
20%
15%
10%
5%
0%
0.00%
0.00%
15.79%
0.00%
15.38%
0.00%
16.67%
4.76%
20.00%
0.00%
14.29%
9.09%
12.50%
4.00%
7.14%
6.25%
0.00%
1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001
(0/0) (0/0) (0/6) (3/19) (2/13) (0/5) (1/21) (3/18) (0/12) (1/7) (2/10) (1/11) (1/25) (0/10) (1/8) (1/14) (1/16)
Year of Award

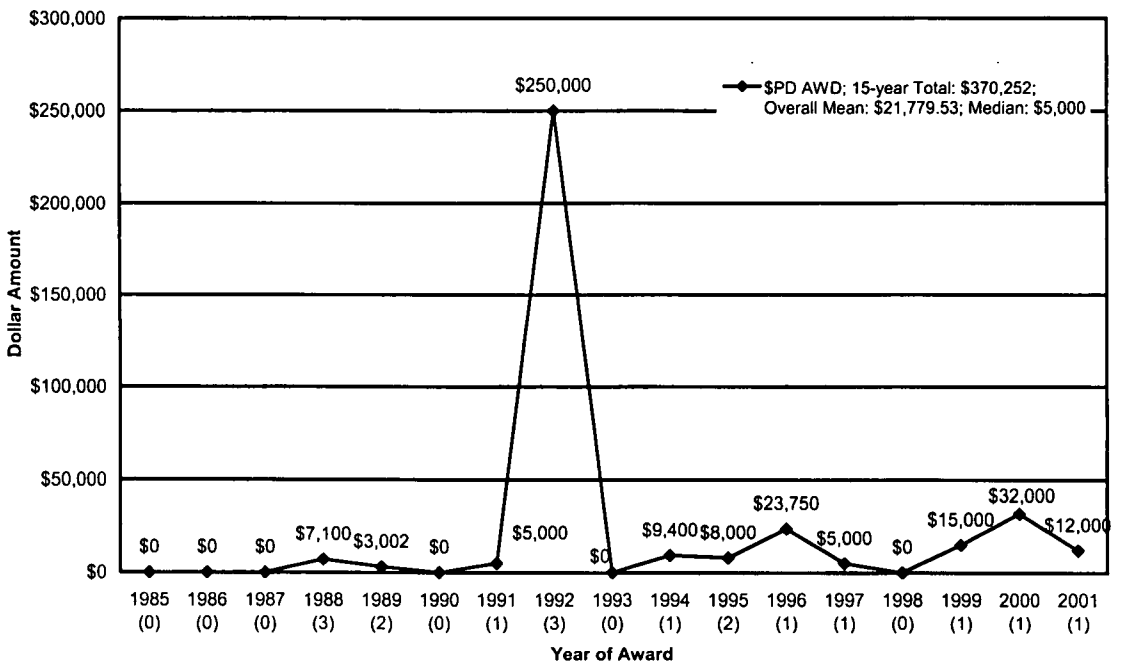
CAAP Chart 4
Tort Awards in Hawaii State CAAP: 1985-2001
Percentage of Requests for Punitive Damages (#PD REQ) Compared to Tort Awards (#T AWD)

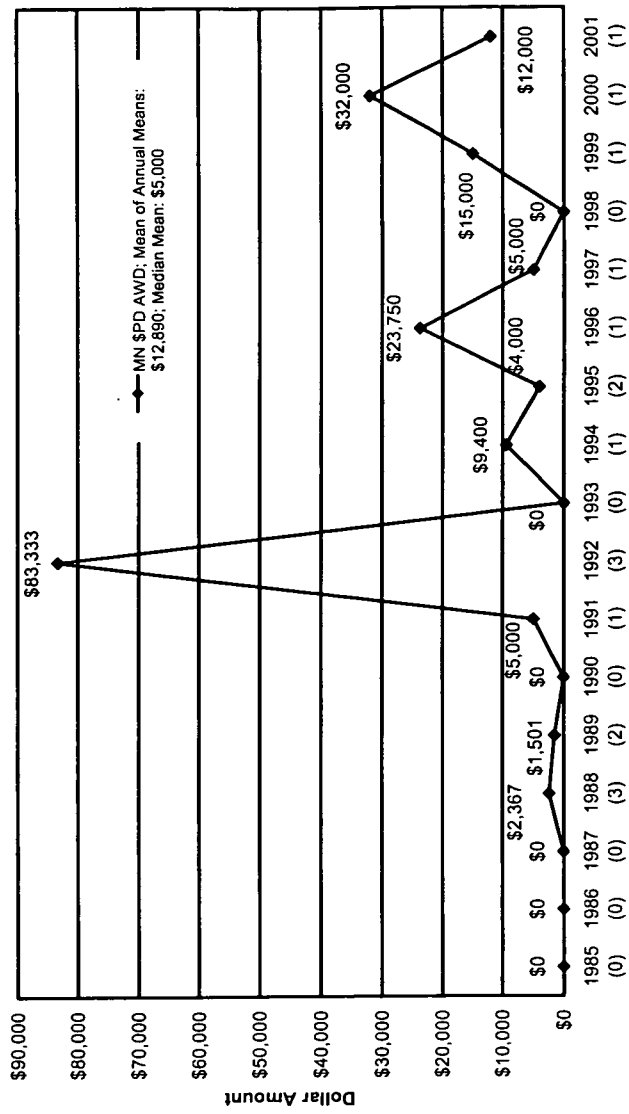


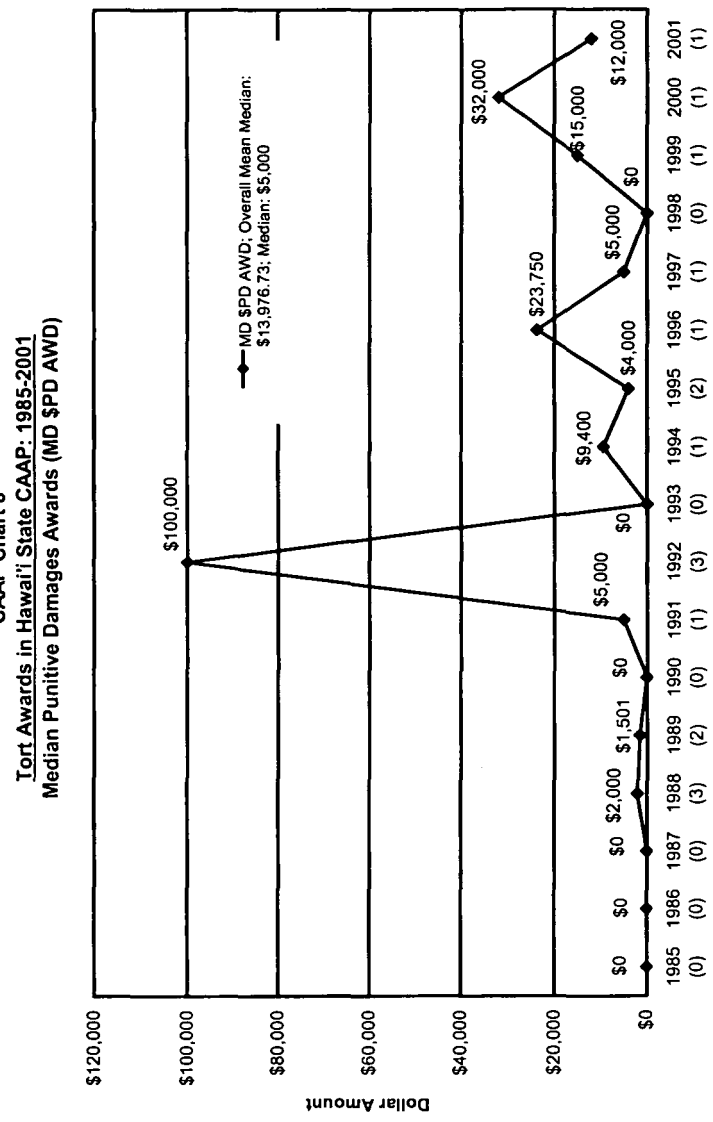
CAAP Chart 5
Tort Awards in Hawai'i State CAAP: 1985-2001
Punitive Damages Awards (#PD AWD)
Compared to Awards for Plaintiffs (#P AWD)



CAAP Chart 6
Tort Awards in Hawaii State CAAP: 1985-2001
Punitive Damages Awards ($PD AWD)



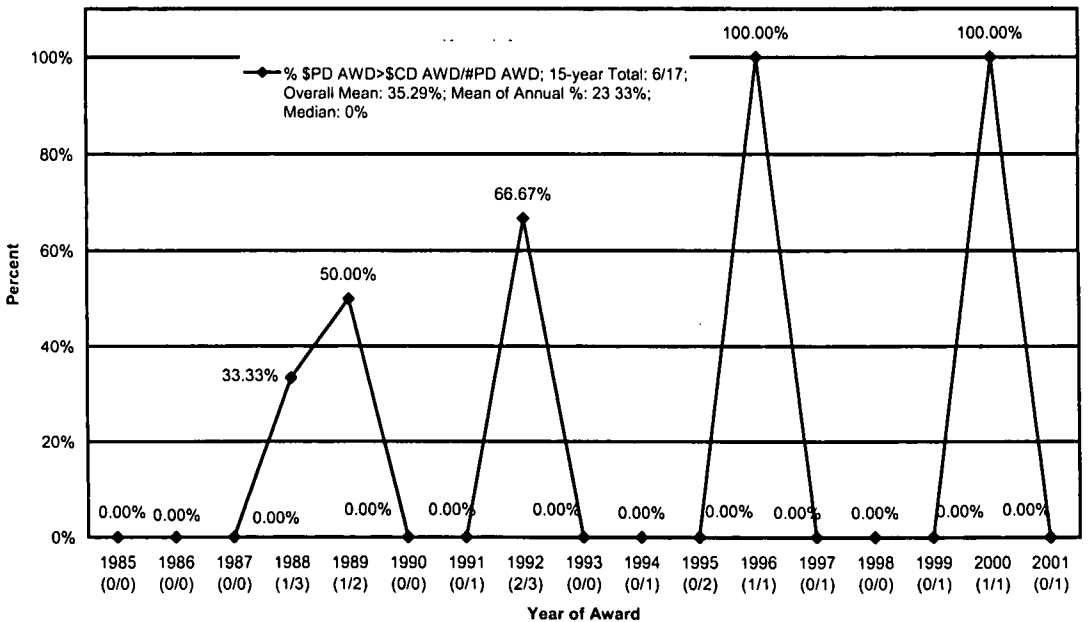

CAAP Chart 7
Tort Awards in Hawai'i State CAAP: 1985-2001
Mean Punitive Damages Awards (MN $PD AWD)
MN $PD AWD; Mean of Annual Means: $12,890; Median Mean: $5,000
Dollar Amount
$90,000
$80,000
$70,000
$60,000
$50,000
$40,000
$30,000
$20,000
$10,000
$0
$83,333
$2,367
$1,501
$5,000
$9,400
$23,750
$4,000
$32,000
$5,000
$15,000
$0
$12,000
1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001
(0) (0) (0) (3) (2) (0) (1) (3) (0) (1) (2) (1) (1) (0) (1) (1) (1)
Year of Award

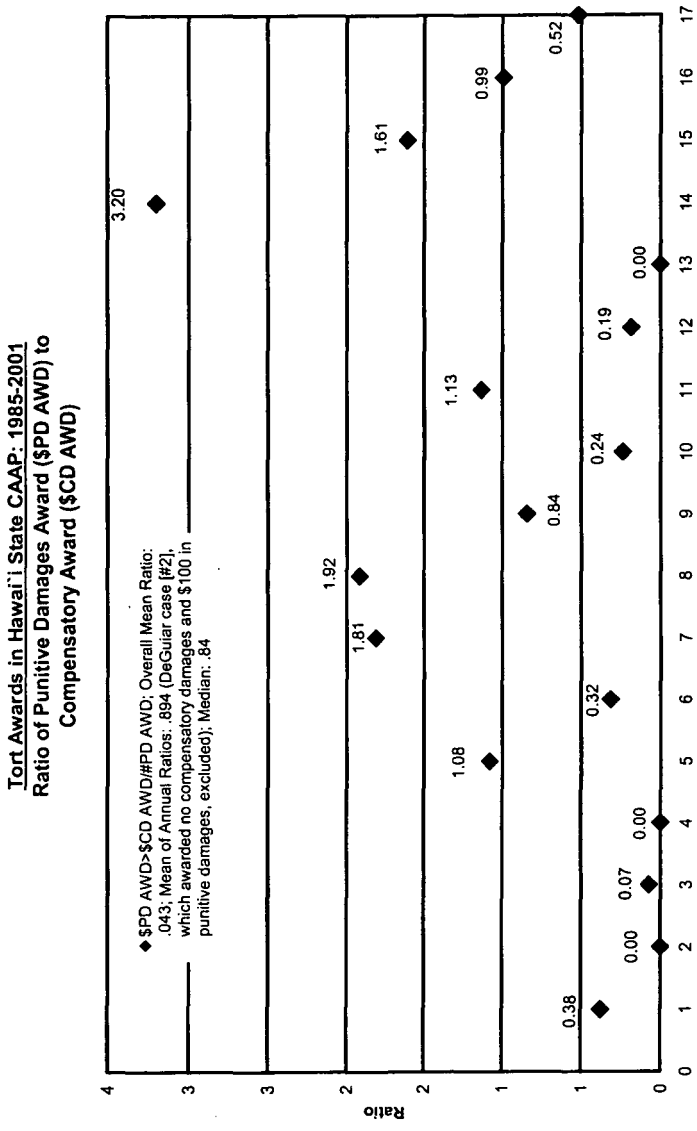

CAAP Chart 8
Tort Awards in Hawai'i State CAAP: 1985-2001
Median Punitive Damages Awards (MD $PD AWD)
MD $PD AWD; Overall Mean Median: $13,976.73; Median: $5,000
Dollar Amount
$120,000
$100,000
$80,000
$60,000
$40,000
$20,000
$0
Year of Award
1985 (0) $0
1986 (0) $0
1987 (0) $0
1988 (3) $2,000
1989 (2) $1,501
1990 (0) $0
1991 (1) $5,000
1992 (3) $100,000
1993 (0) $0
1994 (1) $9,400
1995 (2) $4,000
1996 (1) $23,750
1997 (1) $5,000
1998 (0) $0
1999 (1) $15,000
2000 (1) $32,000
2001 (1) $12,000

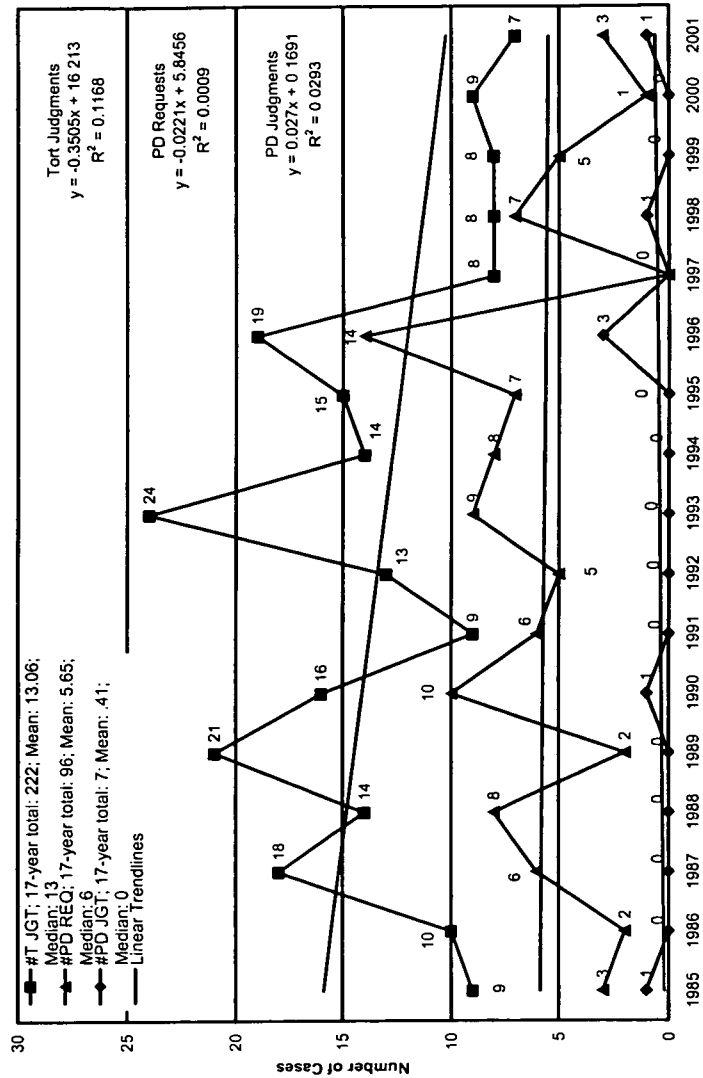
CAAP Chart 9

Tort Awards in Hawai`i State CAAP: 1985-2001

Percentage of Awards Where the Punitive Damages Award ($PD AWD) Exceeded the Compensatory Damages Award ($CD AWD)



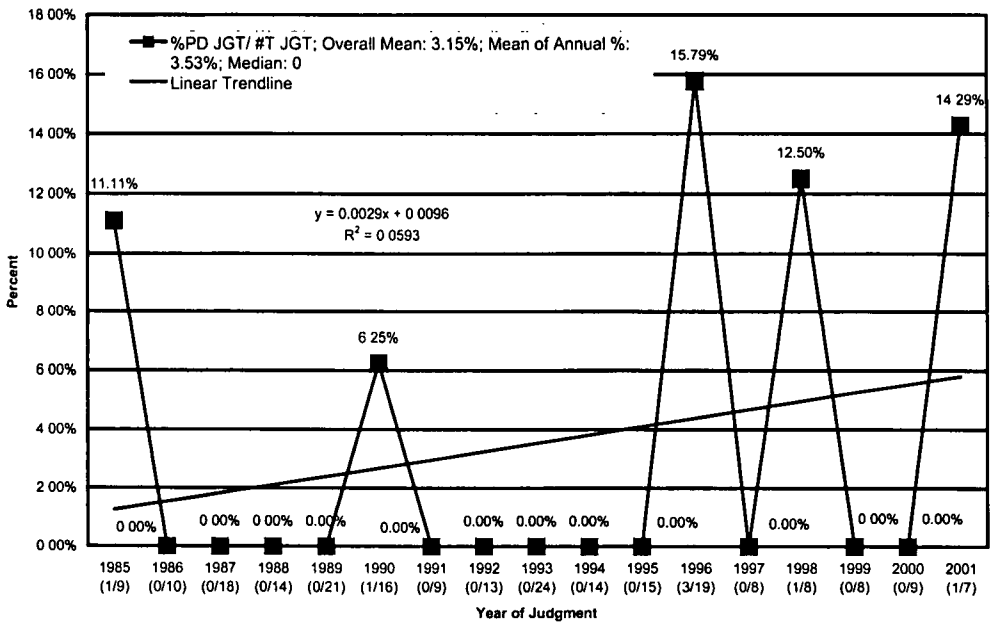

CAAP Chart 10
Tort Awards in Hawai'i State CAAP: 1985-2001
Ratio of Punitive Damages Award ($PD AWD) to Compensatory Award ($CD AWD)
◆ $PD AWD>$CD AWD/#PD AWD; Overall Mean Ratio: .043; Mean of Annual Ratios: .894 (DeGuiar case [#2], which awarded no compensatory damages and $100 in punitive damages, excluded); Median: .84
Ratio
Punitive Damages Awards
0.38
0.00
0.07
0.00
1.08
0.32
1.81
1.92
0.84
1.13
0.24
0.19
1.61
0.99
0.00
3.20
0.52


Federal Chart 1
Tort Judgments for Hawai'i Federal District Courts: 1985-2001
Number of Tort Judgments (#T JGT), Requests for Punitive Damages (#PD REQ), and Punitive Damages Awards (#PD JGT)
#T JGT; 17-year total: 222; Mean: 13.06; Median: 13
#PD REQ; 17-year total: 96; Mean: 5.65; Median: 6
#PD JGT; 17-year total: 7; Mean: .41; Median: 0
Linear Trendlines
Tort Judgments
y = -0.3505x + 16 213
R² = 0.1168
PD Requests
y = -0.0221x + 5.8456
R² = 0.0009
PD Judgments
y = 0.027x + 0 1691
R² = 0 0293
Number of Cases
Year of Judgment
0
5
10
15
20
25
30
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001

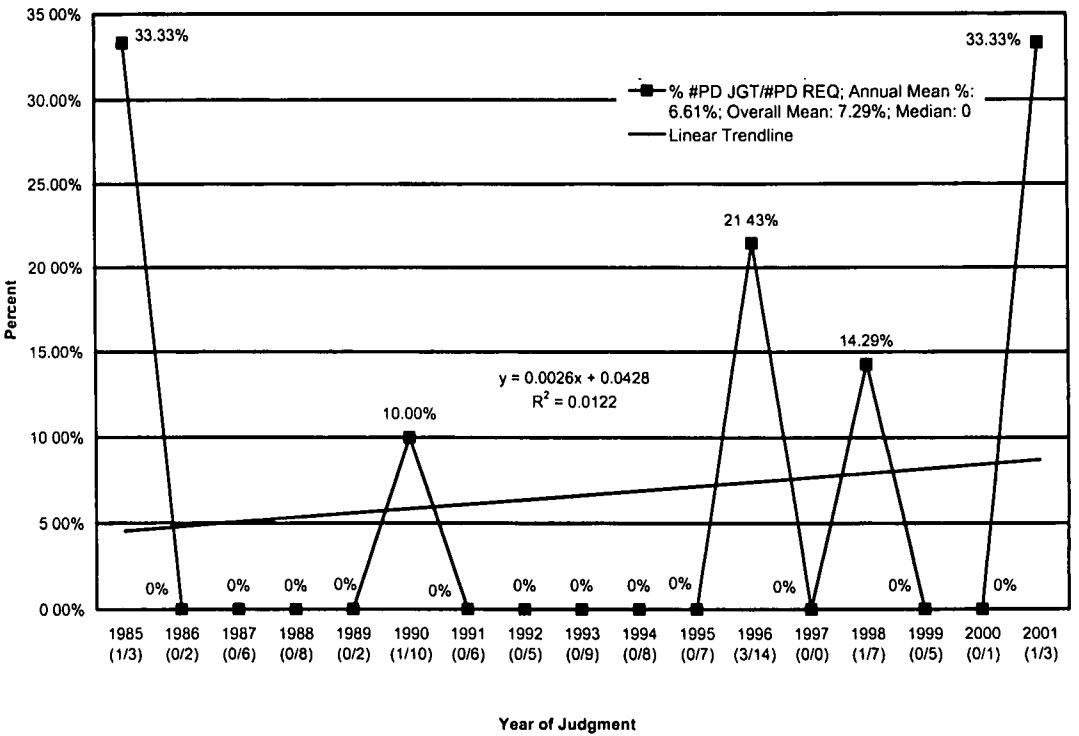
Federal Chart 2

Tort Judgments in Hawaii Federal District Court: 1985-2001

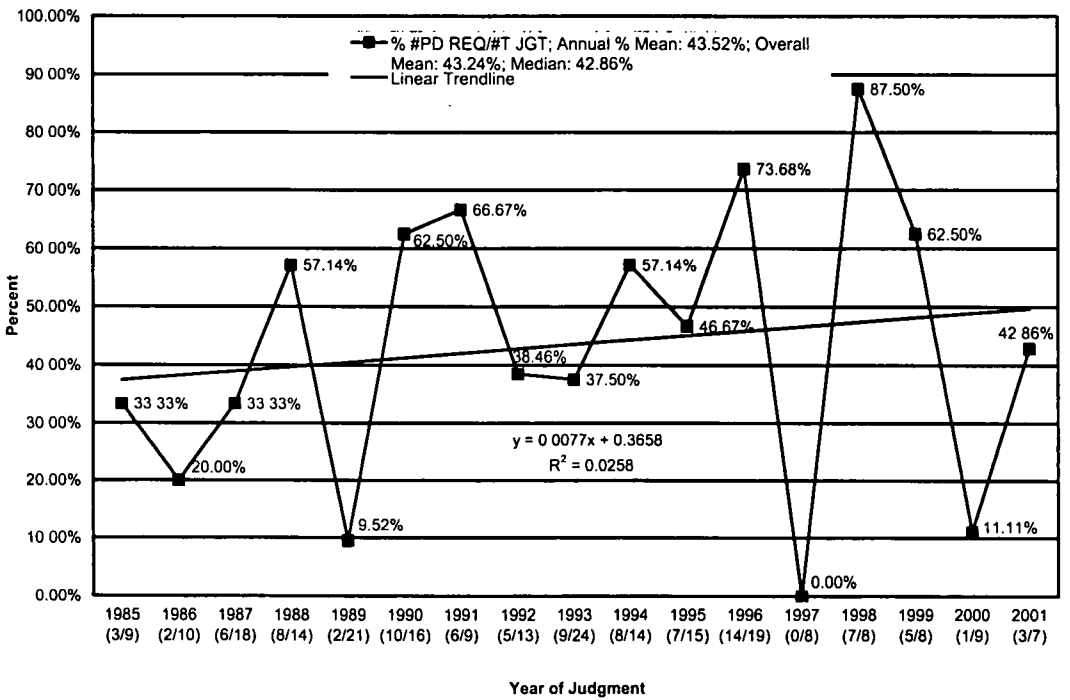
Percentage of Punitive Damages Judgments (#PD JGT) Compared to Tort Judgments (#T JGT)

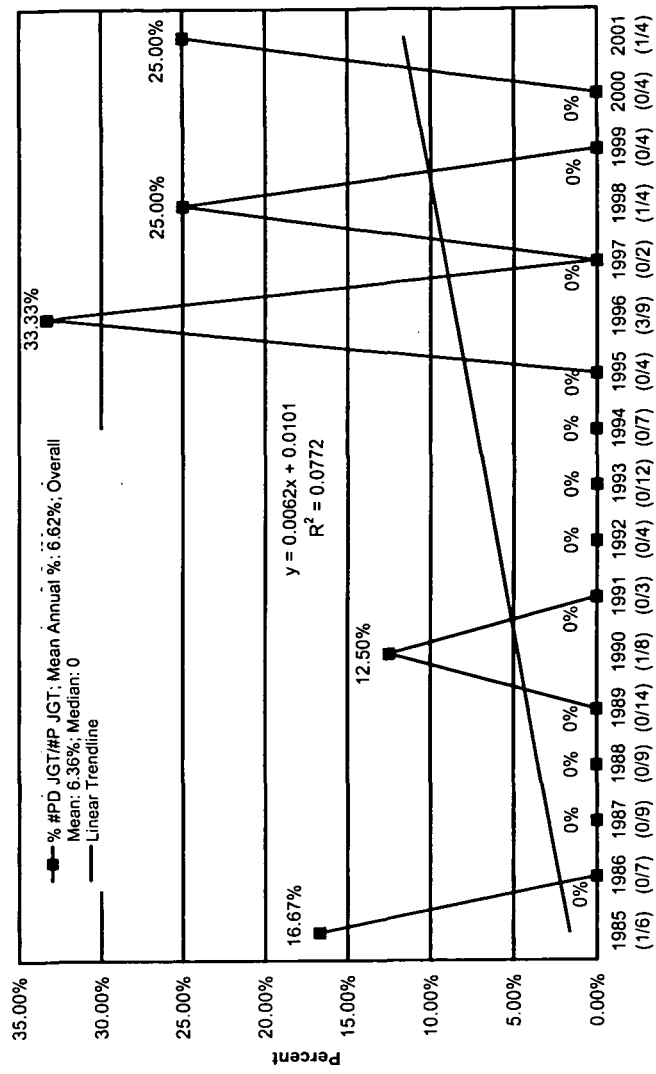


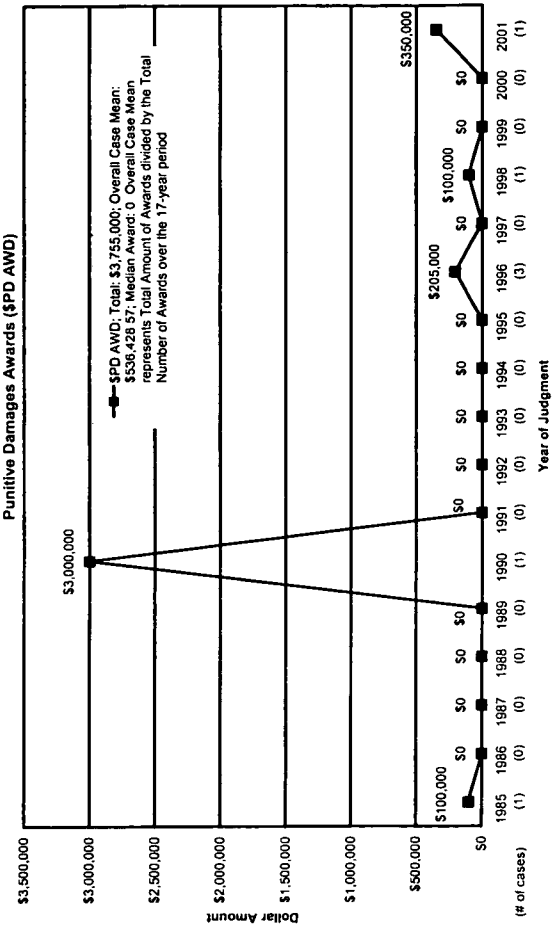
Federal Chart 3
Tort Judgments in Hawai`i Federal District Court: 1985-2001
Percentage of Punitive Damages Judgments (#PD JGT)
Compared to Requests for Punitive Damages (#PD REQ)

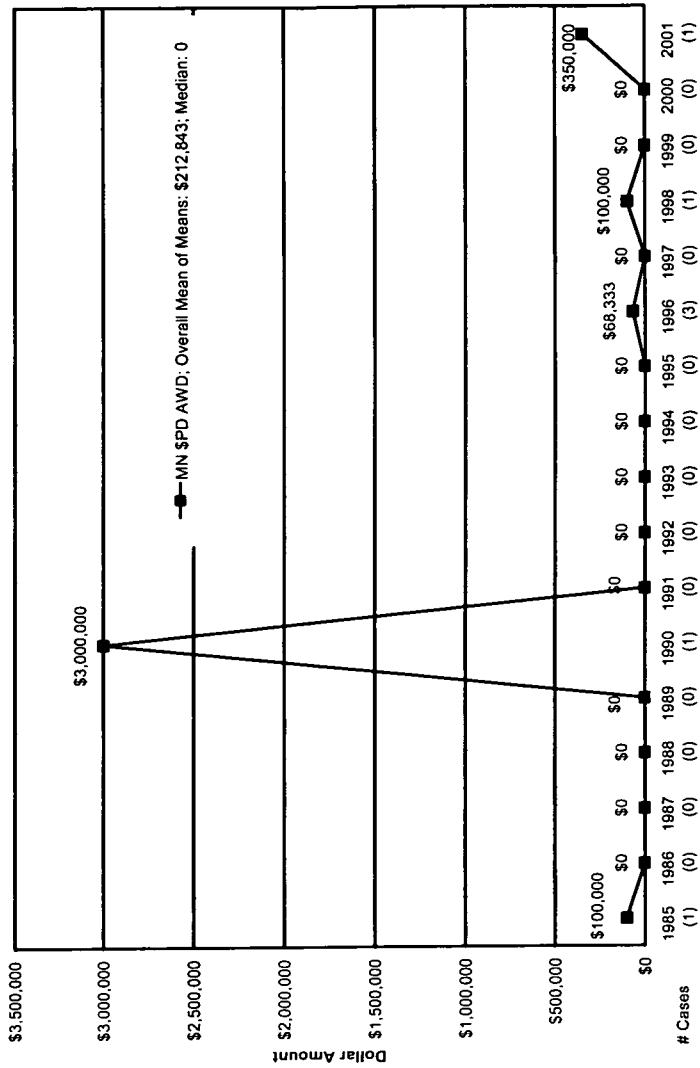


Federal Chart 4
Tort Judgments in Hawai`i Federal District Court: 1985-2001
Percentage of Requests for Punitive Damages (#PD REQ)
Compared to the Tort Judgments (#T JGT)




Federal Chart 5
Tort Judgments In Hawai'i Federal District Courts: 1985-2001
Percentage of Punitive Damages Judgments (#PD JGT)
Compared to Judgments for Plaintiffs (#P JGT)
% #PD JGT/#P JGT; Mean Annual %: 6.62%; Overall Mean: 6.36%; Median: 0
Linear Trendline
y = 0.0062x + 0.0101
R² = 0.0772
Percent
Year of Judgment
35.00%
30.00%
25.00%
20.00%
15.00%
10.00%
5.00%
0.00%
16.67%
33.33%
12.50%
25.00%
25.00%
0%
1985 (1/6)
1986 (0/7)
1987 (0/9)
1988 (0/9)
1989 (0/14)
1990 (1/8)
1991 (0/3)
1992 (0/4)
1993 (0/12)
1994 (0/7)
1995 (0/4)
1996 (3/9)
1997 (0/2)
1998 (1/4)
1999 (0/4)
2000 (0/4)
2001 (1/4)

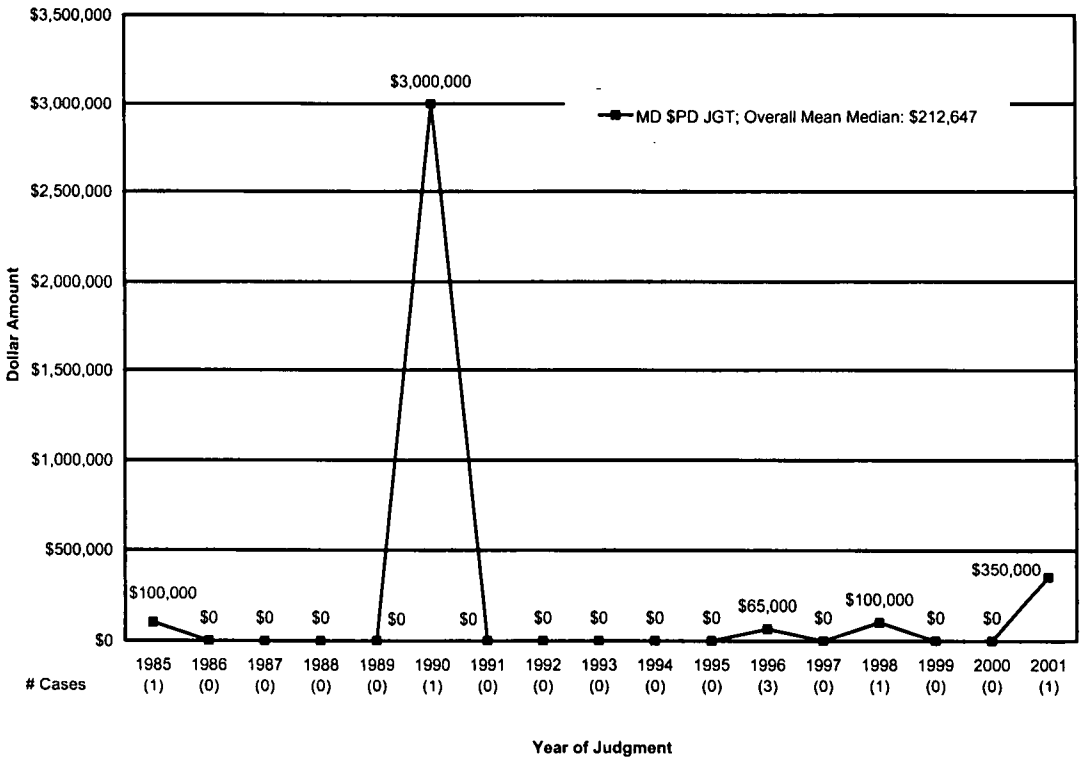

Federal Chart 6
Tort Judgments in Hawai'i Federal District Court: 1985-2001
Punitive Damages Awards ($PD AWD)
$PD AWD; Total: $3,755,000; Overall Case Mean: $536,428.57; Median Award: 0. Overall Case Mean represents Total Amount of Awards divided by the Total Number of Awards over the 17-year period
Dollar Amount
$3,500,000
$3,000,000
$2,500,000
$2,000,000
$1,500,000
$1,000,000
$500,000
$0
$3,000,000
$350,000
$100,000
$205,000
$100,000
(# of cases)
1985 (1)
1986 (0)
1987 (0)
1988 (0)
1989 (0)
1990 (1)
1991 (0)
1992 (0)
1993 (0)
1994 (0)
1995 (0)
1996 (3)
1997 (0)
1998 (1)
1999 (0)
2000 (0)
2001 (1)
Year of Judgment

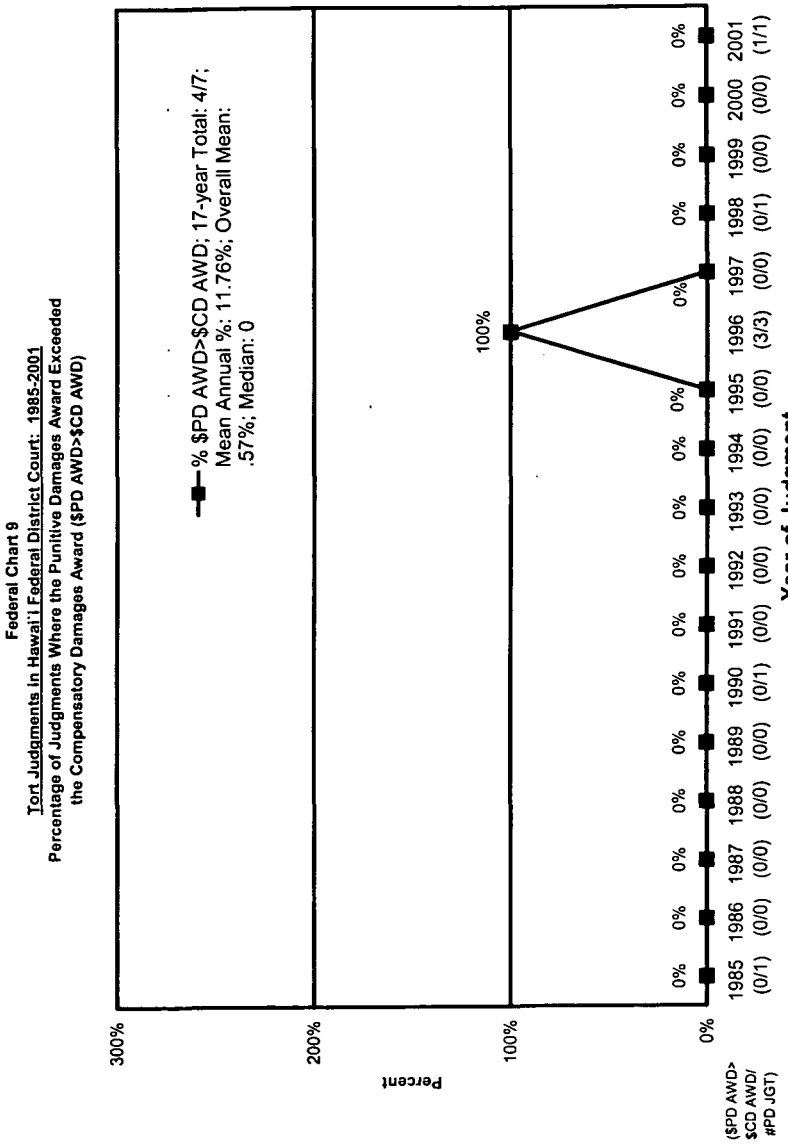

Federal Chart 7
Tort Judgments in Hawai'i Federal District Court: 1985-2001
Mean Punitive Damages Awards (MN $PD AWD)
MN $PD AWD; Overall Mean of Means: $212,843; Median: 0
$3,000,000
$100,000
$350,000
$68,333
$100,000
Dollar Amount
$3,500,000
$3,000,000
$2,500,000
$2,000,000
$1,500,000
$1,000,000
$500,000
$0
Cases
1985 (1)
1986 (0)
1987 (0)
1988 (0)
1989 (0)
1990 (1)
1991 (0)
1992 (0)
1993 (0)
1994 (0)
1995 (0)
1996 (3)
1997 (0)
1998 (1)
1999 (0)
2000 (0)
2001 (1)
Year of Judgment

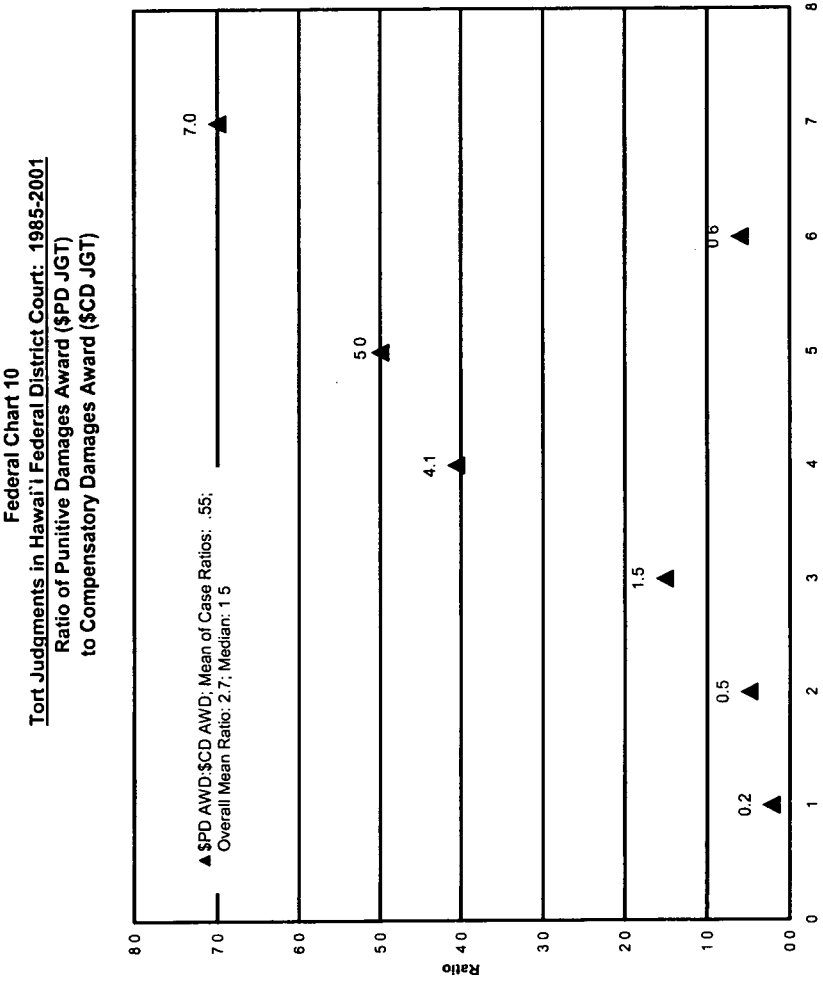
Federal Chart 8

Tort Judgments in Hawai'i Federal District Court: 1985-2001

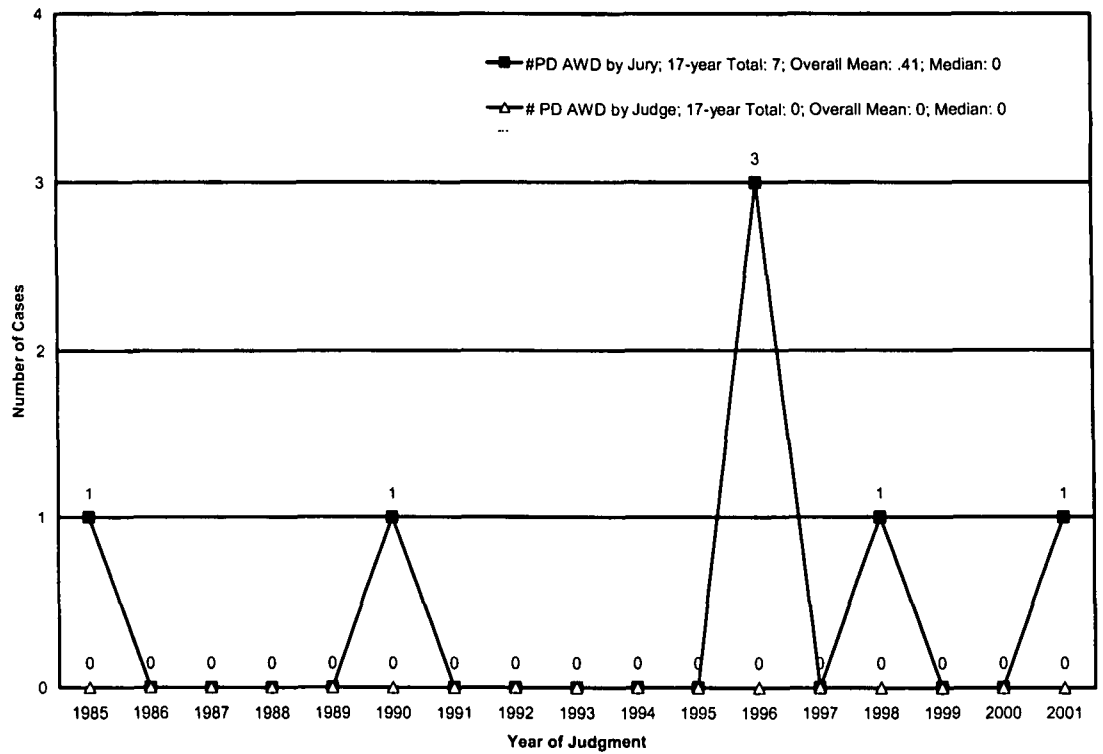
Median Punitive Damages Judgments (MD $PD JGT)



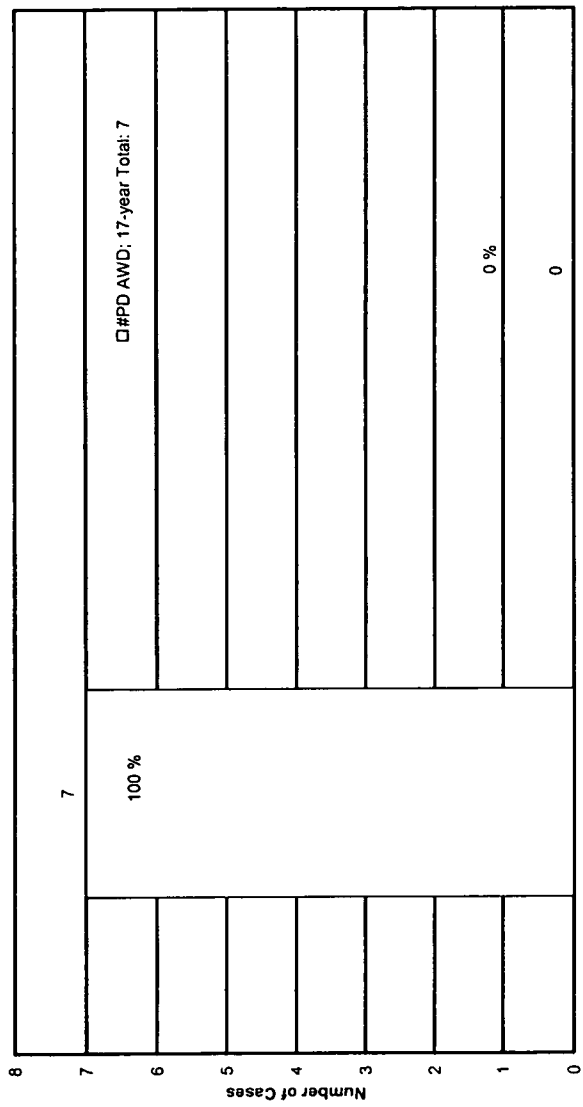

Federal Chart 9
Tort Judgments in Hawai'i Federal District Court: 1985-2001
Percentage of Judgments Where the Punitive Damages Award Exceeded the Compensatory Damages Award ($PD AWD>$CD AWD)
% $PD AWD>$CD AWD; 17-year Total: 4/7; Mean Annual %: 11.76%; Overall Mean: .57%; Median: 0
300%
200%
100%
0%
Percent
100%
0%
Year of Judgment
($PD AWD> $CD AWD/ #PD JGT)
1985 (0/1)
1986 (0/0)
1987 (0/0)
1988 (0/0)
1989 (0/0)
1990 (0/1)
1991 (0/0)
1992 (0/0)
1993 (0/0)
1994 (0/0)
1995 (0/0)
1996 (3/3)
1997 (0/0)
1998 (0/1)
1999 (0/0)
2000 (0/0)
2001 (1/1)


Federal Chart 10
Tort Judgments in Hawai'i Federal District Court: 1985-2001
Ratio of Punitive Damages Award ($PD JGT)
to Compensatory Damages Award ($CD JGT)
▲$PD AWD:$CD AWD; Mean of Case Ratios: .55;
Overall Mean Ratio: 2.7; Median: 1.5
7.0
5.0
4.1
1.5
0.5
0.2
0.6
Ratio
Punitive Damages Awards
0.0
1.0
2.0
3.0
4.0
5.0
6.0
7.0
8.0
0
1
2
3
4
5
6
7
8

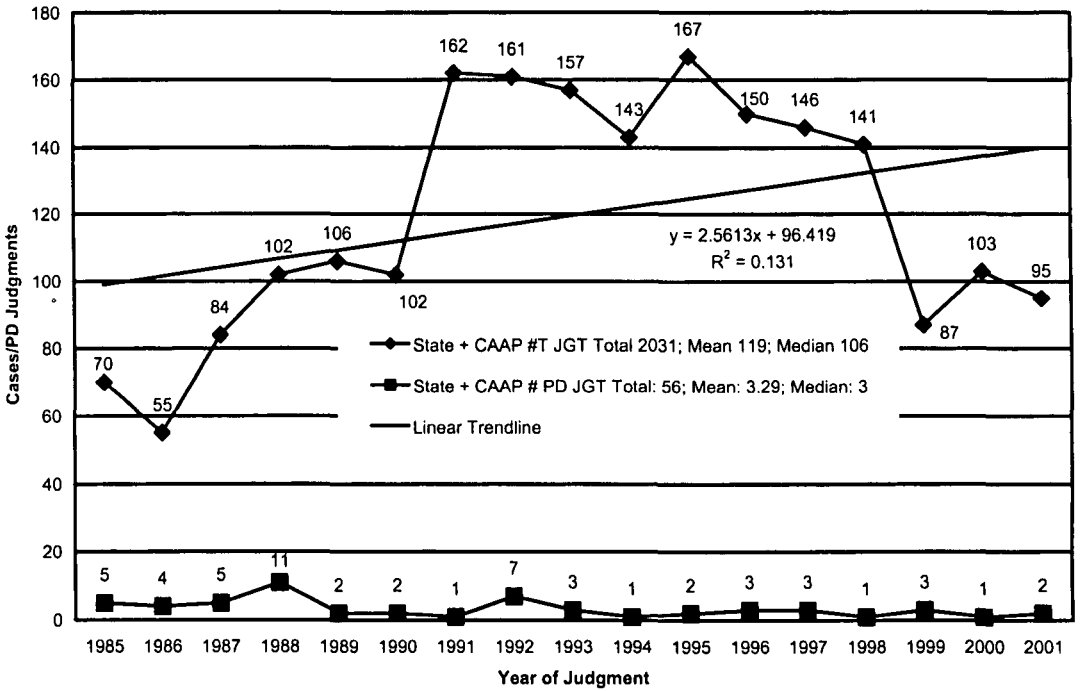
Federal Chart 11
Tort Judgments in Hawai`i Federal District Court: 1985-2001
Punitive Damages Judgments (#PD JGT) by Decisionmaker: Jury and Judge



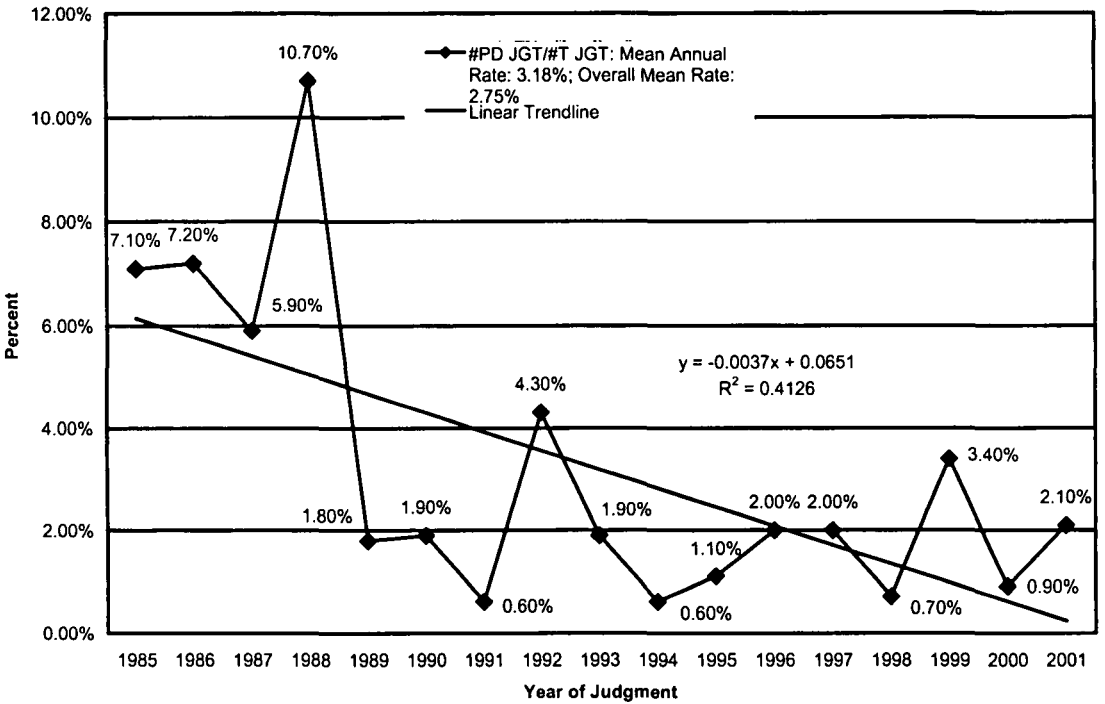
Federal Chart 12
Tort Judgments in Hawai'i Federal District Court: 1985-2001
Comparison of Total Judgments Where Punitive Damages Awarded (#PD JGT), by Decisionmaker



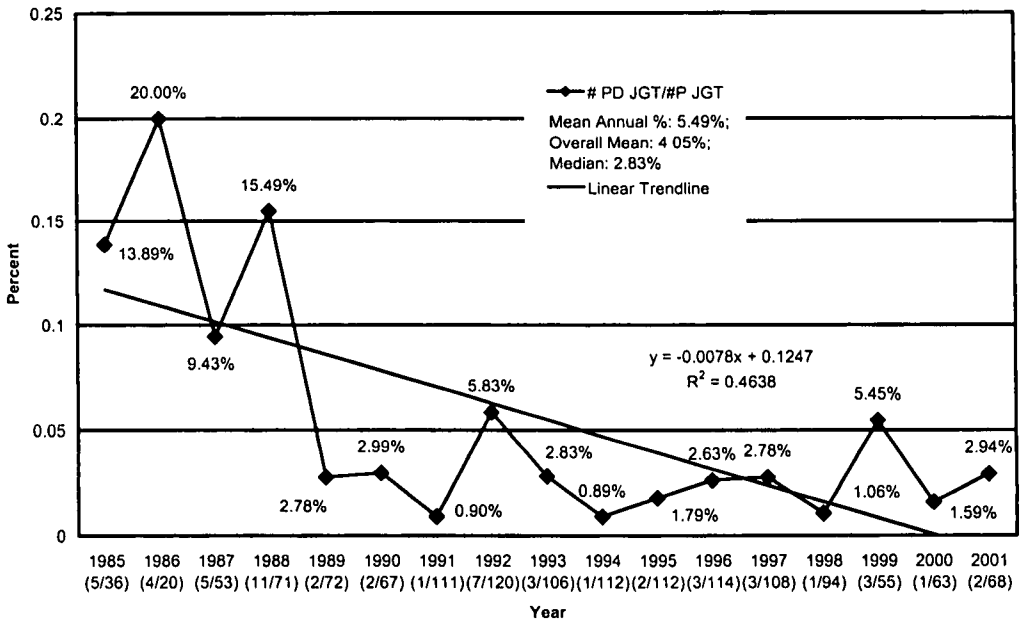
State/CAAP Chart 1:
Tort Judgments in Hawaii State Courts and CAAP: 1985-2001
Tort Judgments (#T JGT) and Punitive Damages Awards (#PD JGT)



State/CAAP Chart 2:
Tort Judgments in Hawaii State Courts and CAAP: 1985-2001
Percentage of Punitive Damages Judgments (#PD JGT)
Compared to Tort Judgments (#T JGT)

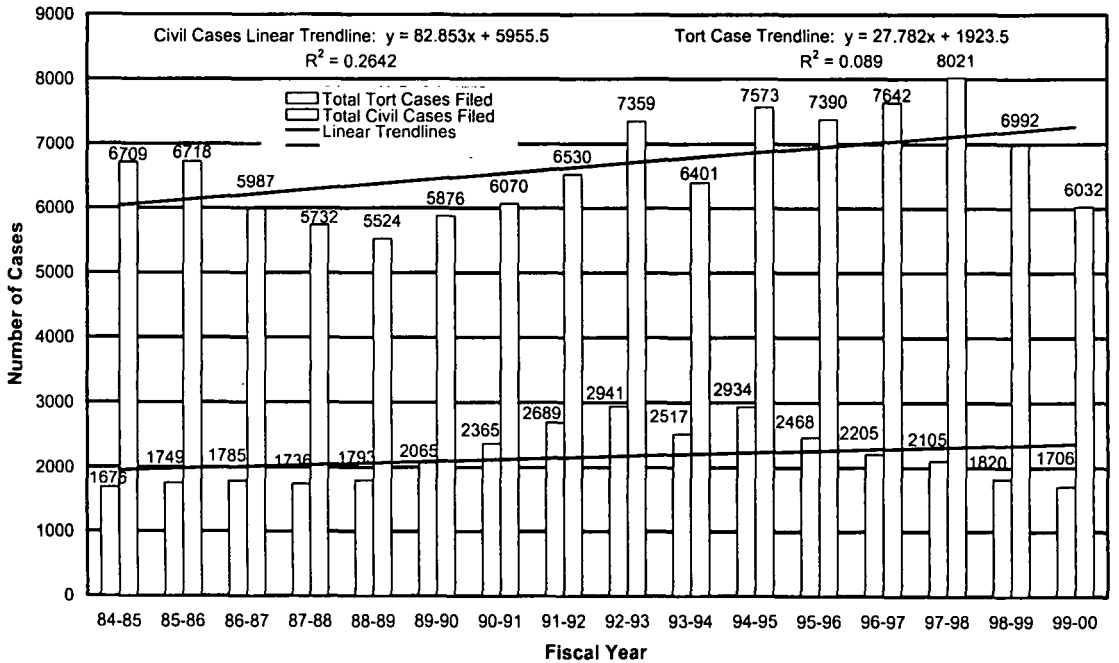


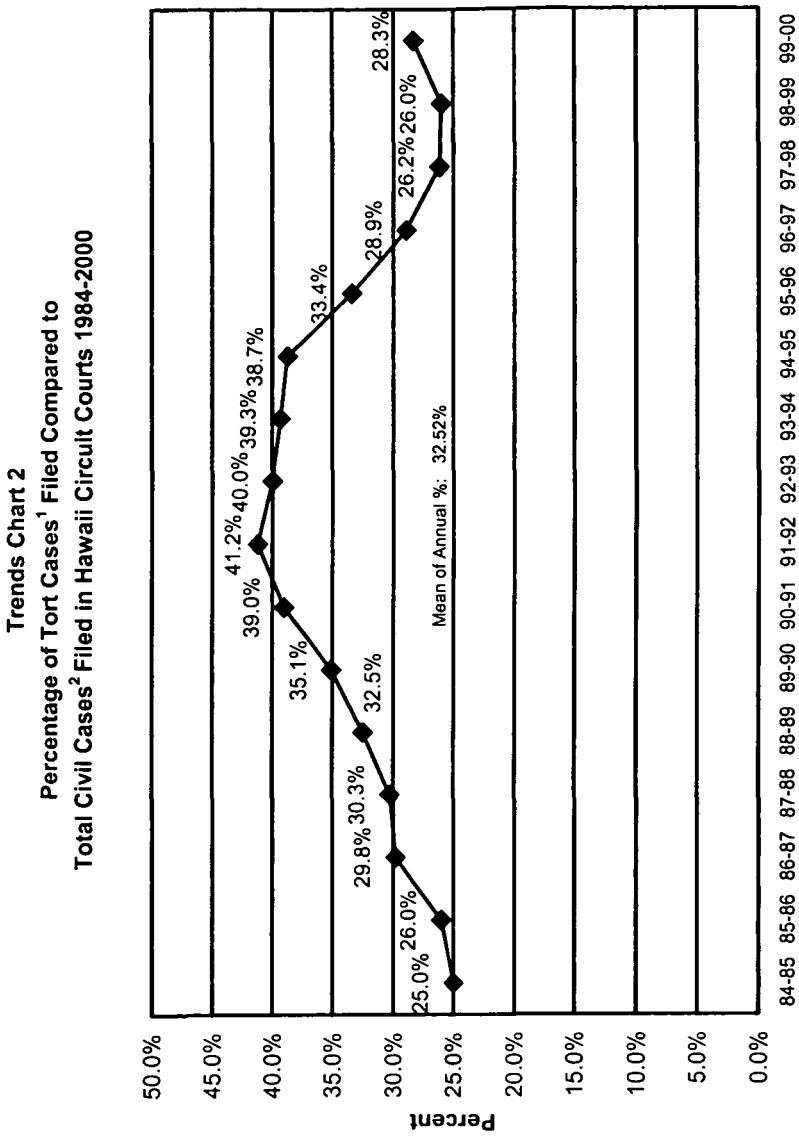
State/CAAP Chart 3:
Tort Judgments in Hawaii State Courts and CAAP: 1985-2001
Percentage of Punitive Damages Judgments (#PD JGT)
Compared to Judgments for Plaintiffs (#P JGT)



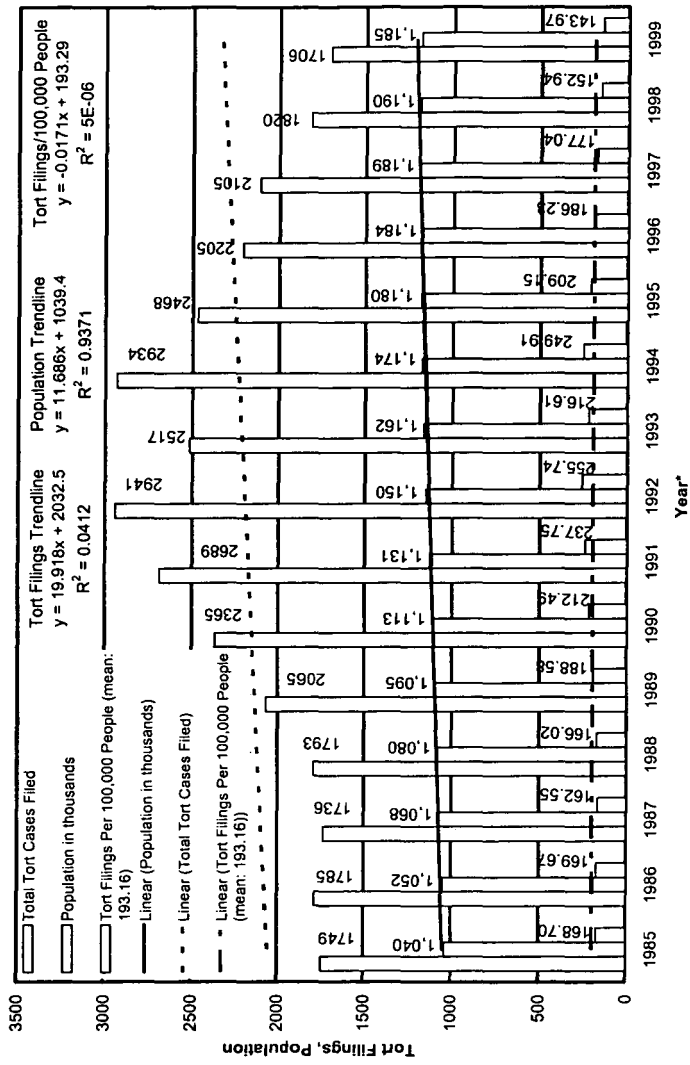
Trends Chart 1

Total Number of Tort Cases[1] Filed Compared to Total Number of Civil Cases[2] Filed in Hawaii Circuit Courts 1984-2000




Trends Chart 2
Percentage of Tort Cases[1] Filed Compared to
Total Civil Cases[2] Filed in Hawaii Circuit Courts 1984-2000
Percent
50.0%
45.0%
40.0%
35.0%
30.0%
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
25.0%
26.0%
29.8%
30.3%
32.5%
35.1%
39.0%
41.2%
40.0%
39.3%
38.7%
33.4%
28.9%
26.2%
26.0%
28.3%
Mean of Annual %: 32.52%
84-85
85-86
86-87
87-88
88-89
89-90
90-91
91-92
92-93
93-94
94-95
95-96
96-97
97-98
98-99
99-00
Fiscal Year

Trends Chart 3
Hawaii Tort Filings Per Capita: 1985-1999



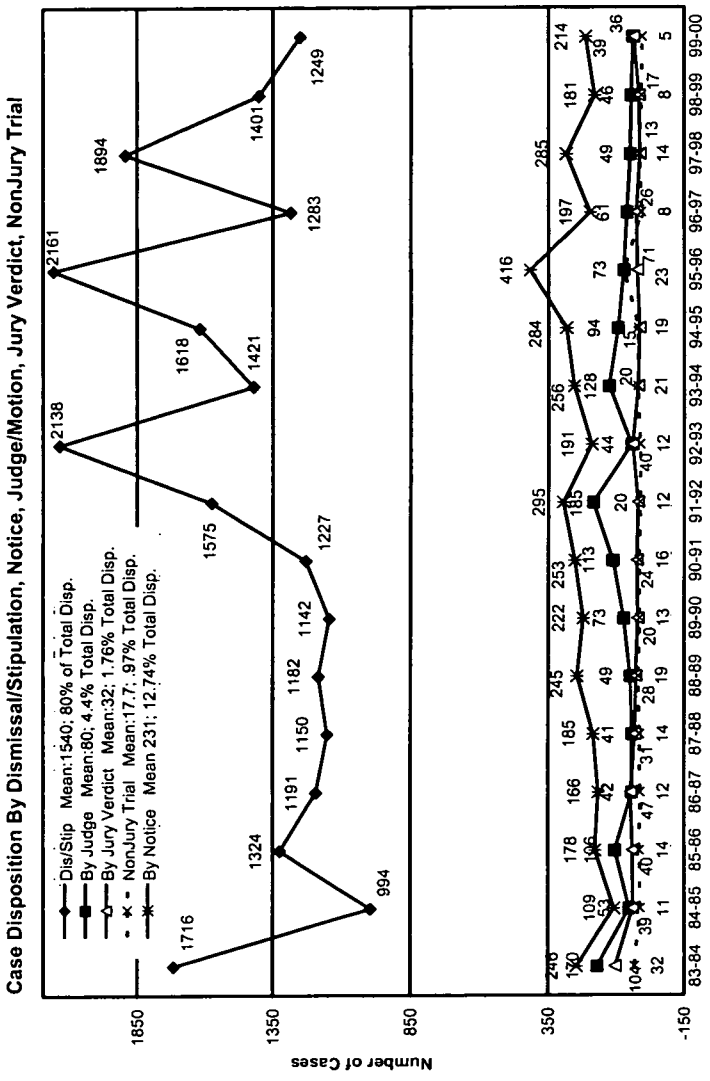

Trends Chart 4
Case Disposition By Dismissal/Stipulation, Notice, Judge/Motion, Jury Verdict, NonJury Trial
Dis/Stip Mean:1540; 80% of Total Disp.
By Judge Mean:80; 4.4% Total Disp.
By Jury Verdict Mean:32; 1.76% Total Disp.
NonJury Trial Mean:17.7; .97% Total Disp.
By Notice Mean 231; 12.74% Total Disp.
Number of Cases
Fiscal Year
1850
1350
850
350
-150
83-84
84-85
85-86
86-87
87-88
88-89
89-90
90-91
91-92
92-93
93-94
94-95
95-96
96-97
97-98
98-99
99-00

Table 1:
All Punitive Damages Judgments: Impact of $250,000 Cap

Case Code	Plaintiff Name	Compensatory Damages	Punitive Damages	Affected by $250k cap?	Loss to P
STATE					
S1	Nakagawa	$1,212,810	$2,500	n	
S2	Sananikone	$47,020	$75,000	n	
S3	Ofisa	$40,000	$20,000	n	
S4	Caris	$16,370	$10,000	n	
S5	Sorrell	$10,691	$30,000	n	
S6	Kanehe	$30,300	$75,000	n	
S7	Critcher	$95,000	$10,000	n	
S8	Batungbacal	$98,269	$3,000	n	
S9	Niesl	$2493	$40	n	
S10	Sigler	$10,950	$50,000	n	
S11	Parnar	$575,000	$1.5m	Y	$1.25 m
S12	Oakes	$6,306	$5,000	n	
S13	Cuson	$275,000	$7,500	n	
S14	Clawson	$37,352	$20,000	n	
S15	Reder	$14,975	$15,000	n	
S16	Masaki	$5,284,000	$11.25m	Y	$11 m
S17	Tilton	$4,110	$3.00	n	
S18	Uyeoka	$4,212,000	$25,000	n	
S19	Rod	$55,893	$4,000	n	

S20	McCurdy	$25,000	$50,000	n	
S21	Rodman	$12,943	$250,000	n	
S22	Lessary	$181,000	$800,000	Y	$550,000
S23	Chase	$282,750	$440,000	Y	$190,000
S24[560]	Vidmar	$1000	$7,500	n	
[S24][561]	Vidmar v. Kan	$300 (for Kan)	$750 (for Kan)	(n)	
S25	Calleon	$644,510	$150,000	n	
S26	Ditto	$1,403,500	$600,000	Y	$350,000
S27	Kfentzis	$262,072	$70,000	n	
S28	Santiago	$250,000	$250,000	n	
S29	Schmidt	None	$35,000	n	
S30	Mohr	$1,000	$1,500	n	
S31	Tabieros	$479,400	$52,000	n	
S32	Kim	$7,400	$25,000	n	
S33	Sullivan	$1.312m	$500,000	Y	$250,000
S34	Mcauley	$65,600	$62,000	n	
S35	Schefke	$504,892	$300,000	Y	$50,000
S36	Kikumoto v. HTH Corp.	$3.00 (for HTH)	$1.00 (for HTH)	n	
S37	Wilder	$2900	$50,000	n	
S38	Awai	$50,607	$15,000	n	

[560] This case is also listed under Category 8 because punitive damages were also awarded to the defendant.

[561] This case was also counted in Category 1.

S39	Takaki	$400,000	$4,785,974	Y	$4,535,974
Total				8/39 = 20.51 %	$18,175,974
CAAP					
C1	Laronal	$13,318	$5,000	n	
C2	DeGuiar	None	$100	n	
C3	Searles	$27,000	$2,000	n	
C4	Ito	$19,252	$1.00	n	
C5	Harper	$2779	$3000	n	
C6	Gregory	$317,316	$100,000	n	
C7	Armstrong	$27,559	$50,000	n	
C8	Du Pont	$52,190	$100,000	n	
C9	Panganiban	$3,561	$3,000	n	
C10	Ching	$20,849	$5,000	n	
C11	Rosette	$20,940	$23,750	n	
C12	Hubert	$26,568	$5,000	n	
C13	Yuson	$79,180	$15,000	n	
C14	Does	$12,000	$32,000	n	
C15	Subia	$23,000	$12,000	n	
C16	Floyd	$3,113.89	$5,000	n	
C17	Hart	$9,465	$9,400	n	
Total				0/17=0 %	
FED					

F1	Locricchio	$427,000	$100,000	n	
F2	Mitchell	$9.2m	$3m	Y	$2,750,000
F3	Gretzinger v. Lamb	$452,750 (for Lamb)	$80,000 (for Lamb)	n	
F4	Arceneaux	$12,000	$60,000	n	
F5	Mano	$163,750	$100,000	n	
F6	Carnell	$32,000	$65,000	n	
F7	Pulse	$50,000	$350,000	Y	$100,000
Total				2/7 = 28.57 %	$2,850,000

Table 2:
Distribution of Punitive Damages Cases Among Categories[562]

Cat.	# St.	% of Cat./ % of Ss	# CAAP	% of Cat./ % of Cs	# Fed	% of Cat./ % of Fs	Total #	% of total
1	13	57% 33%	10	43% 59%	0	0% 0%	23	36.5 %
2	7	64% 18%	2	18% 12%	2	18% 29%	11	17.4 6%
3	6	60% 15%	4	40% 23%	0	0% 0%	10	15.8 7%
4	3	60% 8%	1	20% 6%	1	20% 14%	5	7.9 %
5	5	62% 13%	0	0% 0%	3	38% 43%	8	12.6 9%

[562] Parentheses indicate percentage if all three cases in Category 8 are counted (one of which is also counted in Category 1).

6	**2**	**100% 5%**	**0**	**0% 0%**	**0**	**0% 0%**	**2**	**3.17 %**
7	**2**	**100% 5%**	**0**	**0% 0%**	**0**	**0% 0%**	**2**	**3.17 %**
8	**1 (2)**	**50% (67%) 3%**	**0**	**0% 0%**	**1**	**50% (33%) 14%**	**2(3)**	**3.17 %**
All	**39 (40)**	**62%**	**17**	**27%**	**7**	**11%**	**63 (64)**	**2**

Table 3:
Summary of Judgment Amounts & Ratios, By Category
Omitted due to layout constraints; available at author's website:
www2.hawaii.edu/~antolini

Table 4:
Category 1: Violent Aggressors: Assaulters, Batterers, and Arsonists
(Mean of Ratios calculated from total of all ratios, divided by 23 = 1.82.
Overall Mean Ratio calculated from Total Pds/Total CDs = 3.30)

Case Code	Plaintiff Name	Compens-atory	Punitive	Narrative	Ratio PD: CD
S3	Ofisa	$40,000	$20,000	woman abducted, beaten, raped, sodomized	.5
S4	Caris	$16,370	$10,000	woman beaten, choked in attempted murder	.6
S8	Batung-bacal	$98,269	$3,000	police officer beat P over parking space dispute	.03
S9	Niesl	$2493	$40	boy pushed boy into ditch	.02

S10	Sigler	$10,950	$50,000	police officers arrested and beat P	4.57
S12	Oakes	$6,306	$5,000	police officer beat P in front of wife/children over traffic spat	.79
S19	Rod	$55,893	$4,000	high school beating	.07
S24[563]	Vidmar	$1000	$7,500	sexual abuse, assault, battery of woman	7.5
S27	Kfentzis	$262,072	$70,000	nightclub brawl	.27
S28	Santiago	$250,000	$250,000	fellow inmate drove pencil into P's eye	1.0
S32	Kim	$7,400	$25,000	bar fight	3.38
S34	Mcauley	$65,600	$62,000	woman beaten and abused by Waikik bar customers	.95
S39	Takaki	$400,000	$4,785,974	arson of competitor's movie production truck	11.90
S (13) 57%	**Subtotal MN MD**	**$1,216,713 $ 93,593 $ 40,000**	**$5,292,514 $ 407,116 $ 20,000**		**31.58 2.43 .79**
C2	DeGuiar	none	$100	missed punch by illegal parker	0
				mistaken	

[563] Note this case is also listed under Category 8 because punitive damages were also awarded to the defendant.

C5	Harper	$2779	$3000	identity beating of young woman	1.08
C6	Gregory	$3317,316	$100,000	bullet to groin in confrontation over girlfiend	.32
C7	Arm-strong	$27,559	$50,000	football battery	1.81
C8	Du Pont	$52,190	$100,000	burglar shot officer with automatic weapon	1.92
C9	Pangan-iban	$3,561	$3,000	woman kidnapped, raped, beaten, left in field by former boyfriend	.84
C10	Ching	$20,849	$5,000	unprovoked tackling disabled P	.24
C11	Rosette	$20,940	$23,750	high school security guard beat student	1.13
C12	Hubert	$26,568	$5,000	sleeping P sexually assaulted /beaten by another man	.19
C14	Does	$12,000	$32,000	woman lured and sexually assaulted	2.67
C (10) 43%	**Subtotal MN MD**	**$ 483,762 $ 48,376 $ 20,895**	**$321,850 $ 32,185 $ 14,375**		**10.20 1.02 .96**
F(0)	-	-	-		-

0%					
All Table 3 N=23	**Total MN MD**	**$1,700,475 $ 73,934 $ 20,940**	**$5,614,364 $ 244,103 $ 20,000**	**Overall Mean Ratio = 3.30**	**41.78 1.82 .84**

Table 5:
Category 2: Abusers of Power: Sexual Harassers, Wrongful Terminators, Relatiatory Dischargers

(Mean Ratio of 2.88 calculated by totaling all ratios in column then dividing by 11. The Overall Mean Ratio ($2.715 divided by $3.292) is .82. The Mean Ratio is much higher because of the *Wilder* case, which had a 17.24 ratio, which gets "hidden" when the Overall Ratio is calculated.)

Case Code	Plaintiff Name	Compens-atory	Punitive	Narrative	Ratio PD:CD
S5	Sorrell	$10,691	$30,000	fraudulent psychiatrist forced P's eviction	2.80
S11	Parnar	$575,000	$1.5m	woman fired to prevent testimony to grand jury	2.60
S25	Calleon	$644,510	$150,000	wrongful termination wh.-blower	.23
S33	Sullivan	$1.312m	$500,000	older top female car sales manager demoted and replaced by younger men	.38
S35	Schefke	$504,892	$300,000	age discrim., retaliation against older man	.59

S37	Wilder	$2,900	$50,000	female hair salon employee sexually harassed by employer	17.24
S38	Awai	$50,607 **MD**	$15,000	homosexual supervisor harassed P on the job	.30
S(7) 64%	**Subtotal MN MD**	**$3,100,600 $ 442,942 $ 504,892**	**$2,545,000 $ 363,571 $ 150,000**		**24.14 3.45 .59**
C1	Laronal	$13,318	$5,000	woman sexually abused by employer	.38
C16	Floyd	$3,113.89	$5,000	woman constructive discharge for refusal to work on sabbath	1.61
C(2) 18%	**Subtotal MN MD**	**$16,431.89 $ 8,215.95 $ 8,215.95**	**$10,000 $ 5,000 $ 5,000**		**1.99 .995 .995**
F4	Arcen-eaux	$12,000	$60,000 **MD**	female labor organizer sexually harassed by employer	5.00
F5	Mano	$163,750	$100,000	female union employee wrongfully terminated and defamed	.61 **MD**

F(2) 18%	**Subtotal MN MD**	**$175,750 $ 87,875 $ 87,875**	**$160,000 $ 80,000 $ 80,000**		**5.6 2.8 2.8**
All Tabl e 2 N=11	**Total MN MD**	**$3,292,781.89 $ 299,343.8 $ 50,607**	**$2,715,000 $ 246,818 $ 60,000**	**Overall Mean Ratio = .82**	**31.73 2.88 .61**

Table 6:
Category 3: Reckless and Intoxicated Drivers: Drunks and Speeders
(Mean of Ratios calculated from total of all case ratios, divided by 10 = .34.
Overall Mean Ratio calculated from Total Pds/Total CDs = .026.)

Case Code	Plaintiff Name	Compensatory	Punitive	Narrative	Ratio PD:CD
S1	Naka-gawa	$1,212,810	$2,500	driver admitted liability for instant death of P	.00
S2	Sana-nikone	$47,020	$75,000	drunk driver admitted liabilty for rear-ending P	1.6
S13	Cuson	$275,000	$7,500	drunk driver hit kids on school lawn and fled	.03
S15	Reder	$14,975	$15,000	drunk driver admitted he hit P and infant daughter, then fled	1.00
S17	Tilton	$4,110	$3.00	drunk driver admitted rear-ending van with three children	.00
S18	Uyeoka	$4,212,000	$25,000	drunk driver admitted crashing head-on into P, catastrophic injuries	.00

S (6) 60%	**Subtotal MN MD**	**$5,765,915 $ 960,985 $ 161,010**	**$128,000 $ 21,333 $ 11,250**		**2.63 .44 .02**
C3	Searles	$27,000	$2,000	D admitted rear-ending P and fleeing scene	.07
C4	Ito	$19,252	$1.00	D drank, fell asleep at wheel, rear-ended P	.00
C13	Yuson	$79,180	$15,000	minors speeding on freeway crashed into elderly P driver	.19
C15	Subia	$23,000	$12,000	drunk driver admitted rear-ending P on highway	.52
C (4) 40%	**Subtotal MN MD**	**$148,432 $ 37,108 $ 25,000**	**$29,001 $ 7,250 $ 7,000**		**.78 .195 .13**
F (0) 0%	**Subtotal MN MD**	-	-		-
All Tabl e 3 N=10	**Total MN MD**	**$5,914,347 $ 591,435 $ 37,010**	**$154,004 $ 15,400 $ 9,750**	**Overall Mean Ratio = .026**	**3.41 .34 .05**

Table 7:
Category 4: Gross Negligence: Dog Bites, Shorebreak Accidents, Medical Fraud, Workplace Injury
(Mean of Ratios calculated from total of all ratios, divided by 5= 1.156.
Overall Mean Ratio Calculated from total Pds/total CDs = .38)

Case Code	Plaintiff Name	Compensatory	Punitive	Narrative	Ratio PD:CD
S6	Kanehe	$30,300	$75,000	Akita bit P multiple times, bit 5 other people	2.48
S23	Chase	$282,750 **MD**	$440,000 **MD**	hotel failed to warn guest of dangerous shorebreak; 86 prior accidents; P permanently disabled	1.56
S26	Ditto	$1,403,500	$600,000	Dr. botched breast surgery, causing infections and multiple painful procedures	.43
S (3) 60%	**Subtotal MN MD**	**$1,716,550 $ 572,183 $ 282,750**	**$1,115,000 $ 371,667 $ 440,000**		**4.47 1.49 1.56**
C17	Hart	$ 9,465	$ 9,400	Negligent chiropractic adjustment, inappropriate touching, inebriated defendant	.99
C (1) 20%	**Subtotal MN MD**	**$ 9,465 $ 9,465 $ 9,465**	**$ 9,400 $ 9,400 $ 9,400**		**.99**
F2	Mitchell	$9.2m	$3m	hotel failed to	.32

				warn guest of dangerous shorebreak; 137 prior accidents; P rendered quadriplegic	
F (1) 20%	**Subtotal MN MD**	**$9.2m $9.2m $9.2m**	**$3m $3m $3m**		**.32 .32 .32**
All Table 4 N=5	**Total MN MD**	**$10,926,015 $ 2,185,203 $ 282,750**	**$4,124,400 $ 824,880 $ 440,000**	**Overall Mean Ratio = .38**	**5.78 1.156 .99**

Table 8:
Offenses Against Mental and Physical Freedom: Intentional/Negligent Infliction of Emotional Distress, Defamation, False Arrest, Malicious Prosecution
(Mean of Ratios calculated from total of all ratios, divided by 8 = 2.22.
Overall Mean Ratio calculated from Total Pds/Total CDs = 1.89.)

Case Code	Plaintiff Name	Compens-atory	Punitive	Narrative	Ratio PD:CD
S14	Clawson	$37,352	$20,000	merchant false arrest[564]	.54
S20	McCurdy	$25,000	$50,000	plastic surgeon defamed, lost business from dispute with competing surgeon	2.0
S22	Lessary	$181,000	$800,000	attorney coerced and defamed client	4.42
S29	Schmidt	none	$35,000	tenant verbally threatened and	NA

[564] Defendant's motion for a new trial was granted; evidence suggested that plaintiff had engaged in refund fraud.

				harassed by condo guard and president	
S30	Mohr	$1,000	$1,500	attorney maliciously defamed another atty	1.5
S (5) 62%	**Subtotal MN MD**	**$244,352 $ 48,870 $ 25,000**	**$906,500 $181,300 $ 35,000**		**8.46 1.69 1.5**
C (0) 0%	**Subtotal MN MD**	-	-		-
F1	Locri-ccho	$427,000	$100,000	defamation, wrongful termination, emotional distress	.23
F6	Carnell	$32,000	$65,000	woman assaulted and abused by arresting officers, denied care	2.03
F7	Pulse	$50,000	$350,000	P incarcerated for 3 years on unlawful search/seizure of gun, perjury of officers	7.0
F (3) 38%	**Subtotal MN MD**	**$509,000 $169,667 $ 50,000**	**$515,000 $171,667 $100,000**		**9.26 3.09 2.03**
All Tabl e 5 N=8	**Total MN MD**	**$753,352 $ 94,169 $ 34,500**	**$1,421,500 $ 177,688 $ 57,500**	**Mean Overall Ratio = 1.89**	**17.72 2.22 1.75**

Table 9:

Category 6: Dishonesty: Fraud, Conversion, Breach of Contract

(Mean of Ratios calculated from total of all ratios, divided by 2 = 9.71.
Overall Mean Ratio calculated from Total Pds/Total CDs = 2.40)

Case Code	Plaintiff Name	Compens-atory	Punitive	Narrative	Ratio PD:CD
S7	Critcher	$95,000	$10,000	son defrauded mother in real estate sale	.10
S21	Rodman	$12,943	$250,000	attorney abused client trust account	19.32
S (2) 100 %	**Subtotal MN MD**	**$107,943 $ 53,972 $ 53,972**	**$260,000 $130,000 $130,000**		**19.42 9.71 9.71**
C (0) 0%	**Subtotal MN MD**	-	-		-
F (0) 0%	**Subtotal MN MD**	-	-		-
All Table 6 N=2	**Total MN MD**	**$107,943 $ 53,972 $ 53,972**	**$260,000 $130,000 $130,000**	**Overall Mean Ratio = 2.40**	**19.42 9.71 9.71**

Table 10:
Category 7: Unsafe Products

(Mean of Ratios calculated from total of all ratios, divided by 2 = 1.15.
Overall Mean Ratio calculated from Total of Pds/Total of CDs = 1.96)

Case Code	Plaintiff Name	Compens-atory	Punitive	Narrative	Ratio PD:CD
S16	Masaki	$5,284,000	$11.25m	defective van reversed in "park," crushing P, quadriplegic	2.12

S31	Tabieros	$479,400	$52,000	defective dock straddler collided with P's car, crushing his legs	.11
S (2) 100%	**Subtotal MN MD**	**$5,763,400 $2,881,700 $2,881,700**	**$11,302,000 $5,651,000 $5,651,000**		**2.23 1.15 1.15**
C (0) 0%	**Subtotal MN MD**				
F (0) 0%	**Subtotal MN MD**				
All Table 7 N=2	**Total MN MD**	**$5,763,400 $2,881,700 $2,881,700**	**$11,302,000 $5,651,000 $5,651,000**	**Mean Overall Ratio = 1.96**	**2.23 1.15 1.15**

Table 11:
Category 8: Turning the Tables: When Defendants Win Reverse Punitive Damages

(Mean of Ratios calculated from total of all ratios, divided by 3 = 1.00.
Mean Overall Ratio calculated from Total of Pds/Total of Cds = .18)

Case Code	Plaintiff Name	Compens -atory	Punitive	Narrative	Ratio PD:CD
S36	Kikumoto v. HTH Corp.	$3.00 (for HTH)	$1.00 (for HTH)	Corporate officer P alleged wrongful termination; D corporation countered that P stole confidential documents to blackmail D on salary	.33

[S24] [565]	Vidmar v. Kan	$300 (for Kan)	$750 (for Kan)	P alleged sexual abuse, assault, battery in domestic dispute with D; D countered for assault, battery, abuse of process	2.5
S (2) 67%	**Subtotal MN MD**	**$303 $151.5 $151.5**	**$751 $375.5 $375.5**		**2.83 1.42 1.42**
C (0) 0%	**Subtotal MN MD**	-	-		-
F3	Gretzinger v. Lamb	$452,750 (for Lamb)	$80,000 (for Lamb)	UH student claimed professor sexually harassed, bribed, and raped her; Professor countered that P was lying, sued for defamation, IIED, abuse of process	.18
F (1) 33%	**Subtotal MN MD**	**$452,750 $452,750 $452,750**	**$80,000 $80,000 $80,000**		**.18**
All Tabl e 8 N=2/ 3	**Total MN MD**	**$453,053 $151,017 $ 300**	**$80,751 $26,917 $ 750**	**Mean Overall Ratio = .18**	**3.01 1.00 .33**

Table 12:
Comparison of Hawaii and Florida Studies
and Table 13:
Types of Defendants in Punitive Damages Cases
Omitted due to layout constraints; available on author's website:
www2.hawaii.edu/~antolini

[565] This case was also counted in Category 1.

APPENDIX A:
TWO SAMPLE *PIJH* JUDGMENT REPORTS

COURT ANNEXED ARBITRATION PROGRAM

Personal Injury Judgments Hawaii © Copyright 1991 Advocates Research Company

Court: 4	Civil No.: 90186	Arbitrator: Jeanne L. Hughes	Judgment Date: 5/22/91
BETTY J. FLOYD, Plaintiff, vs. WAKENHUT OF HAWAII, et.al., Defendants. Case Caption:		Cause(s) of Action: Constructive Discharge—Age & Sex Discrimination- Breach of Employment Agreement- Intentional Infliction of Emotional Distress Plaintiff, a Seventh-Day Adventist, hired by defendant on or about 5/17/89, contended that when she was hired she had an agreement with her supervisor not to schedule her to work during her sabbath from dusk friday night to dusk saturday night, that in late March 1990, a new supervisor approached her and told her she would have to work that weekend which included her sabbath and for the following weekends, that she was forced to quit, that defendant's constructive discharge was in violation of public policy, state law (§ 378-2 HRS) and the Constitution of the State of Hawaii... Case Summary/Court Annexed Arbitration Program:	
Plaintiff(s) Atty: William Fenton Sink			
Defendant(s) Atty: Kari A. Wilhelm (Roeca Louie & Hiraoka, of counsel)			
Date Complaint Filed: 7/23/90		Prayer: SD, GD, Pun.D. & Prejudgment Interest TBDATOT	
Plaintiff's age: 63	Sex: F	Occupation: Pre-departure screening (x-ray) inspector	Marital Status: M

ALLEGED INJURIES

SPECIAL DAMAGES

Emotional Distress	Medical	None claimed
	Lost Earnings	$3,113.89*
	Total	$3,113.89

Spouse Claiming Loss of Consortium? N/A		If so, Amount:
Offer of Judgment? None	If so, Amount:	Defendant(s) Carrier:
Plaintiff(s) Last Demand: $100,000		No. Arbitration Hearing Days: 1
Defendant(s) Last Offer: None		Bifurcated Hearings? No

Plaintiff(s) Expert(s): None		
Defendant(s) Expert(s): None		
Prejudgment Interest Award? N/A	Judgment For:	Plaintiff
Defendant denied plaintiff's allegations, contending that its personnel at the Kona Airport were short-handed, that the new supervisor only asked plaintiff if she would be willing to work on her sabbath, that defendants' employees, with the exception of plaintiff, all worked 6 days a week (plaintiff worked 4 days a week), that plaintiff indicated she had an agreement to work 4 days a week with her sabbath off, that defendant denied any agreement limiting plaintiff's work to 4 days a week, that the hiring supervisor had a scheduling agreement with plaintiff (not to schedule her to work during her sabbath), that plaintiff quit on or about 3/29/90. The intentional infliction of emotional distress count was dismissed on defendant's motion on exclusive remedy grounds. **ARBITRATION AWARD**: The arbitrator found liability for plaintiff, awarding damages as shown. Judgment entered for plaintiff after appeal period ran.	General Damages	None
	Special Damages	$3,113.89
	Punitive Damages	$5,000
	Total	$8,113.89
	* Plaintiff had a stroke in November 1990 and claimed the difference in pay between her jobs after the alleged constructive discharge and the date of the stroke. Note: Defendant offered plaintiff re-employment which was refused.	

Case Summary Cont'd/Misc.

Abbreviations:

COURTS: #1= U.S. District; #2= 1st Circuit; #3= 2nd Circuit; #4= 3rd Circuit; #5= 5th Circuit

J/JW: J= Jury Trial, JW= Jury Waived **MARITAL STATUS**: M= Married, S= Single, W= Widow

DAMAGES: SD= Special Damages, GD= General Damages, PunD= Punitive Damages

OTHER: TBDATOT= To be determined at time of trial, M&C= Maintenance and Cure, D/A= Date of Accident

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COURT ANNEXED ARBITRATION PROGRAM

Personal Injury Judgments Hawaii © Copyright 1994 Advocates Research Company

Court: 3	Civil No.: 900567	Arbitrator: Douglas J. Sameshima	Judgment Date: 10/14/94
DEBBIE HART, Plaintiff,		Cause(s) of Action: Negligence-Sexual Assault (Malpractice) Plaintiff is a licensed massage therapist. She was	

vs. DR. MICHAEL C. PIERNER, D.C., Defendant. Case Caption:	under contract with the defendant to provide massage therapy in his office. On January 11, 1990 she was in an accident while driving; she had served to the right to avoid some wood that fell from a truck. She hit the wood which punctured her tire. On the shoulder her vehicle ran into a large hole and stopped. On January 15, 1990, defendant asked her if she wanted an adjustment. Plaintiff agreed and went into the defendant's office and while on the adjustment table, fully clothed, she contended that defendant negligently adjusted her cervical spine causing her a cervical injury and that the defendant who had been drinking, touched her inappropriately. She subsequently saw a psychiatrist who diagnosed a Case Summary/Court Annexed Arbitration Program:

Plaintiff(s) Atty: Kevin H.S. Yuen			
Defendant(s) Atty: Stephen B. Songstad			
Date Complaint Filed: 10/4/90		Prayer: SD, GD, & Pun.D. TBDATOT	
Plaintiff's age: 33	Sex: F	Occupation: Licensed Massage (L.M.T.)	Marital Status: S
ALLEGED INJURIES SPECIAL DAMAGES			
Cervical strain; post traumatic stress disorder. Treated by a chiropractor and psychiatrist. No temporary total disability or lost earnings claim.		Medical	$8,209.93
		Lost Earnings	None
		Total	$8,209.93
Spouse Claiming Loss of Consortium? N/A		If so, Amount:	
Offer of Judgment? None	If so, Amount:	Defendant(s) Carrier: None*	
Plaintiff(s) Last Demand: Confidential		No. Arbitration Hearing Days: 2	
Defendant(s) Last Offer: Confidential		Bifurcated Hearings? No	
Plaintiff(s) Expert(s): Gary Tanksley, Chiropractor			
Defendant(s) Expert(s): Martin Blinder, Psychiatrist			
Prejudgment Interest Award? N/A		Judgment For: Plaintiff	
P.T.S.D. She came under the care of a chiropractor on February 6, 1990 for her cervical injury and asserted a no-fault claim arising out of the prior accident. On October 29, 1991, she was involved in a subsequent motor vehicle accident. Dr. Tanksley performed an I.M.E. in connection with the second accident and apportioned her cervical injuries 75% to the (second) motor		General Damages	$9,400
		Special Damages	$65.00
		Punitive Damages	$9,400
		Total	$18,865

vehicle accident and 25% to the defendant's adjustment. Defendant denied plaintiff's allegations of negligent adjustment and sexual assault, contending that he gave her a standard adjustment and in connection with the procedure may have accidentally brushed her body. He denied drinking was involved. He contended plaintiff's credibility was in issue, that she gave contradictory statements to her no-fault carrier's adjustor (first accident) after the alleged sexual assault and gave inconsistent statements about the alleged assault.	**ARBITRATION AWARD**: Comparative negligence was not in issue; liability for plaintiff. Award: $65.00 special damages; $9,400 general damages and $9,400 punitive damages. A judgment was entered as shown after the 20 day period to appeal ran.

Case Summary Cont'd/Misc.

Abbreviations:

COURTS: #1= U.S. District; #2= 1st Circuit; #3= 2nd Circuit; #4= 3rd Circuit; #5= 5th Circuit

J/JW: J= Jury Trial, JW= Jury Waived **MARITAL STATUS**: M= Married, S= Single, W= Widow

DAMAGES: SD= Special Damages, GD= General Damages, PunD= Punitive Damages

OTHER: TBDATOT= To be determined at time of trial, M&C= Maintenance and Cure, D/A= Date of Accident

* National Chiropractic Mutual Insurance Company filed a declaratory relief action in US District Court on the duty to defend, contending plaintiff's allegations were specifically excluded (E&O policy); the carrier prevailed.

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APPENDIX B: NARRATIVES OF PUNITIVE DAMAGE JUDGMENTS IN HAWAII 1985 - 2001

Case Codes: S = State, C = CAAP, F = Federal
(numbered in chronological order within S, C & F categories[566])
Parenthetical code following summary indicates type of defendant (e.g., I = individual, B = business)

1. Violent Aggressors: Assault, Battery, and Arson

Case S3: *Kum Sun Ofisa v. Rolando Navarette* (judgment 8/6/85). In *Ofisa,* the plaintiff, a single waitress, alleged that the defendant, a professional

[566] Two cases are numbered out of order: C16 (Floyd) and C17 (Hart).

boxer, abducted, brutally beat, assaulted, raped, and sodomized her. Ofisa's injuries included multiple contusions and abrasions, lacerations of the lip, neck, back, right elbow and forearm, severe abdominal bruises, severe depression, anxiety and emotional distress, and temporary work disability. The defendant (who proceeded pro se after his counsel withdrew) had already been convicted of sodomy, attempted sodomy, sexual abuse, rape in the first degree, and kidnapping. Circuit Court Judge Takao granted plaintiff's motion for summary judgment on liability and held a one-day jury-waived trial only on the issues of damages.[567] Judge Takao awarded $40,000 in general damages and **$20,000 in punitive damages.** (I)

Case S4: *Lynda L. Caris v. Arthur K. Ludloff* (judgment 8/29/85). In *Caris*, the plaintiff, a single 39-year-old female TV executive, alleged that the defendant wilfully, maliciously, and negligently assaulted and battered her by striking her in the face and body, and choking her in an attempt to kill her. After two days of jury-waived trial, Circuit Court Judge Richard Lum rendered a verdict for the plaintiff, awarding general damages of $15,000, special damages (lost wages and psychologist's bills) of $1,370.50, and **punitive damages of $10,000.** (I)

Case S8: *Stephen R. Batungbacal v. Carlton Young & City and County of Honolulu* (judgment 2/27/86). In *Batungbacal*, the plaintiff, a 23-year-old married auto-body repair worker, alleged that the pro se defendant Carlton Young, a police officer with a prior assault conviction, committed assault and battery on the plaintiff without provocation. After losing a parking space to plaintiff in the Waimalu Shopping Plaza, Young became angry and scuffled with plaintiff, who suffered a broken nose requiring surgery, cervical strain, trauma, and contusions. Circuit Court Judge Ronald T.Y. Moon dismissed co-defendant City, which contended that Young was driving his own car on a personal errand; that Young's uniform was not visible under his raincoat; that he did not identify himself as a police officer; and therefore the City was not liable under respondeat superior. After a three-day bench trial, the Judge Moon found that Young committed assault and battery, awarding general damages of $60,000, special damages of $38,269.15 (medical and lost wages), and **punitive damages of $3,000.** (I) & (City)

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[567] The court also rejected defendant's counterclaim for abuse of process and property damage to his car, as well as for punitive damages.

Case S9: *Michael Niesl, individually and as Guardian Procheim Ami for Joseph Niesl, a minor v. Max Stanton, individually and as Guardian Ad Litem for Willie Stanton, a minor, and Margaret Stanton v. Ronald Reid* (judgment 5/20/86). Plaintiff 9-year-old Joseph Niesl was playing on a footpath over a drainage ditch when defendant Willie Stanton, also a minor, pushed him, causing him to lose his balance and fall into the ditch, fracturing his left arm. Circuit Court Judge Tany Hong held, on the motion in limine of Willie's parents, that although they could be held liable for their son's torts, any punitive damages award must be based on their son's financial condition and not theirs. After dismissing the other defendants (owners of the adjacent properties and footpath) and granting a directed verdict for defendants on plaintiffs' claim of negligence supervision, Judge Tong held a five-day jury trial on the remaining counts of assault and battery, negligence, and negligent infliction of emotional distress. The jury found for the Niesls, awarding general damages of $1,400, special damages of $1,093.23, and **punitive damages (against minor defendant Willie) of $40.** (The Court apparently did not enter the jury's free-standing $39 punitive damages award in favor of Willie against Michael Niesl, the father of Joseph, who allegedly dragged Willie from the scene and threw him onto the ground after the incident.) (I)

Case S10: *Douglas N. Sigler v. City and County of Honolulu; Charles W. Ingram; Albert Chong* (judgment 2/17/87). Plaintiff Sigler, a 24-year-old single Catamaran crewmember, alleged that, while walking in Waikiki with a closed bottle of Schnapps, he was improperly arrested and then beaten while handcuffed by Honolulu police officers. Plaintiff suffered abrasions and lacerations to his face that required 45 stitches and left a residual scar. (Plaintiff was acquitted of charges of criminal littering, for allegedly throwing the bottle in a bush, and resisting arrest.) Circuit Court Judge Melvin Soong dismissed co-defendant officer Chong, the claims of outrage and defamation, the claims against the City for negligent training/supervision and violation of plaintiff's constitutional rights, and then held an eight-day jury trial on the assault and battery and related remaining claims against Ingram and the City. The jury returned a special verdict finding Ingram liable for assault and battery and negligent or intentional infliction of emotional distress, and violating plaintiff's constitutional rights. (The jury also held the City liable on the same claims under respondeat superior.) The jury awarded the plaintiff $10,000 in general damages, $950 in special damages, and **$50,000 in punitive damages** ($25,000 for violating plaintiff's constitutional rights and $25,000 for plaintiff's other claims). (City) & (Is)

Case S12: *Armando Oakes, Delores Oakes, Michael Oakes, and Peter Oakes v. Colburn Ohia, individually as a police officer of the City and County of Honolulu, and City and County of Honolulu* (judgment 9/2/87). In *Oakes*, Armando Oakes, a 45-year-old married sales manager, alleged that, on Father's Day 1983, he was driving home on Kamehameha Highway to Mililani when he cut in front of defendant Ohia where the highway lanes narrowed from four to two. Ohia, an off-duty police officer, followed Oakes to his home and beat him in front of his wife and children, causing plaintiff to suffer a black eye, lacerations on the nose, and contusions. Defendant Ohia claimed that Oakes collided into him while changing lanes, stumbled and fell after parking his car at home, and was convicted of driving under the influence. Circuit Court Judge Titcomb excluded the conviction from trial and dismissed the civil rights claim, limiting the trial issues to assault and battery, negligence, and negligent/intentional infliction of emotional distress. After eight days of trial, the jury found for plaintiff Armando Oakes on all remaining counts and, after reducing the judgment for 25% comparative negligence, Judge Titcomb awarding general damages of $6,056.25 and **punitive damages of $5,000 (solely against Ohia).** General damages of $250 were also awarded to the son, Michael Oakes, who witnessed the beating, but the jury found defendants not liable for the claims of the wife and other son. (I) & (City)

Case C2: *Reginald DeGuiar v. Gordon Logan* (CAAP judgment entered 2/4/88). Plaintiff, a private security guard for a condominium, alleged that defendant assaulted him (throwing a punch that missed by 12") after plaintiff confronted defendant about parking his motor vehicle in an unauthorized area, despite several warnings, and was in the process of having defendant's vehicle towed away. CAAP Arbitrator Michael McCarthy found defendant liable, awarding no general or special damages, but **$100 in punitive damages.** (I)

Case S19: *Ronald Rod v. Steven Fanell and Don E. Fanell* (judgment 7/22/88). Plaintiff, a 19-year-old gas station attendant, alleged that he and his brother accompanied their sister to Kaiser High School to confront defendant Steven Fanell (who was also a student at Kaiser High School) because Fanell was spreading false rumors about plaintiff's sister. A confrontation ensured, and Steven struck plaintiff on the face with a torque wrench, resulting in injuries to plaintiff's face and trauma. Steven claimed self-defense against the larger plaintiff and brother, who were wearing military fatigues. Circuit Court Judge Ronald Moon admitted evidence of Steven's 5-6 prior aggressive

incidents and violent disposition. Judge Moon also ruled that any award for punitive damages would be limited to the financial status of Steven, and not that of his father Don. After plaintiff withdrew his negligence count against Steven during trial, the jury issues were limited to assault and battery. After an eight-day trial, the jury awarded plaintiff general damages of $47,000, special damages of $8,893, and **punitive damages of $4,000 (against Steven only).** (I) & (I/father)

Case C5: *Ginger Harper v. Alfred Freitas* (CAAP judgment entered 10/4/89). Plaintiff Harper, an 18-year-old fast food employee, alleged assault and battery, as well as intentional infliction of emotional distress and gross negligence, from an incident in which defendant Freitas mistakenly believed that Harper had been involved in a graffiti incident adjacent to his home. Freitas had followed a pick up truck from the scene to the Fast Stop, where Harper was parked. Plaintiff alleged that defendant reached into her vehicle, grabbed her head to turn her around, and struck her with a closed fist, resulting in contusion and edema of her left cheek for one week and discoloration of her teeth. CAAP Arbitrator William Matsui found for the plaintiff, awarding her $2,500 in general damages, $279 in special damages, and **$3,000 in punitive damages.** (I)

Case S24: *Sherry Vidmar v. Paul Kan* (judgment 6/18/90). *Vidmar* involved a violent domestic dispute between plaintiff, a single female sales clerk, and defendant, an engineer. Plaintiff claimed that defendant sexually abused her and committed assault and battery for a 1-1/2 year period, resulting in physical and psychological injuries. Defendant denied the allegations and counterclaimed also seeking damages for assault and battery, deceit, and abuse of process. After seven days of trial, the jury found partially in favor of both parties: that defendant struck plaintiff without her consent, that plaintiff struck defendant without consent, that plaintiff's suit was not an abuse of process, and that plaintiff held defendant's property without consent. The jury awarded general damages to plaintiff of $1000, no special damages, and **punitive damages of $7,500.** The jury also awarded special damages of $300 to defendant and **punitive damages of $750.** (I)

Case C6: *Anthony H. Gregory, Jr. v. Mervin Ah Loy, Jr.* (CAAP Judgment entered 3/30/92). In this assault and battery case, defendant (the "new boyfriend") admitted that, without provocation, he shot Gregory, who had come to his former girlfriend's home to pick up some personal property. Gregory suffered a gunshot wound to his groin, with the bullet entering the

base of the penis and traveling to the right femur. CAAP Arbitrator Kenneth Fukunaga noted that defendant had been convicted of assault and did not dispute liability. He awarded plaintiff $250,000 in general damages, $67,316 in special damages, and **$100,000 in punitive damages.** (I)

Case S27: *Kyle Kfentzis and Mark Kafentziz [sic] v. Azubu U.S.A., dba Rumors, Wayne Fumio Pemberton, Richard O. Reb'll (and Sean Kafentziz and Kurt Kafentziz, third-party defendants)* (judgment 7/17/92). This case involved a brawl between the four Kafentziz brothers and defendant minors Pemberton and Reb'll at Rumors nightclub in Honolulu. (The jury ultimately found defendant Azubu, the owner of Rumors, was not negligent.) When the four brother and two defendants were ejected for brawling in the club, another scuffle ensued, in which Pemberton stabbed both plaintiffs. Kyle, a 22-year-old single professional football player, suffered stab wounds to his left arm, a severed artery, and scarring that allegedly ended his career. Mark, a 29-year-old married professional football player, suffered a stab wound to the hip, right thumb, resulting in scarring and allegedly precluding his football career. After ten days of trial, the jury apportioned fault: 15% Kyle, 0% Mark, 75% Pemberton, and 10% Reb'll, awarding damages as follows: 1) Kyle: general damages of $170,850; special damages of $5,712; and **punitive damages of $50,000**; 2) Mark: general damages of $85,000, special damages of $510, and **punitive damages of $20,000.** (B) & (Is)

Case C7: *Dale H. Armstrong and Anna Marie E. Armstrong v. Jerrold H. Childress* (CAAP Judgment entered 11/2/92). Plaintiffs, husband and wife, contended that Mr. Armstrong and defendant, both enlisted men, were playing flag football at Wheeler Field when, without provocation, defendant struck Mr. Armstrong on the face and nose. Plaintiff suffered a fractured nose, chronic sinus infection, and headaches. Defendant denied he intended to injure plaintiff, proceeded pro se, and failed to show up at the hearing. CAAP Arbitrator Michael A. Lilly found that plaintiff was not comparatively at fault, and awarded plaintiff Mr. Armstrong $25,000 in general damages, $2,559 in special damages, and **$50,000 in punitive damages**; he also awarded Mrs. Armstrong $10,000 in general damages. (I)

Case C8: *Dennis Du Pont and Tammy Lin Du Pont v. Wendell A. Pichay and Rosemary A. Kubo* (CAAP Award entered 11/4/92). Plaintiff Dennis Du Pont, a Honolulu Police Officer, received bullet wounds in his cheek and legs when defendant Wendell Pichay, whom Du Pont suspected had committed a burglary at the Waimalu Shopping Center, returned to the scene (where Du

Pont had apprehended Pichay's accomplice) and sprayed the area with an automatic weapon, seriously injuring Du Pont. Plaintiffs claimed assault and battery, negligence, and intentional infliction of emotional distress. CAAP Arbitrator Phillip Uesato found Pichay 100% "negligent," awarding plaintiffs $50,000 in general damages, $2,190 in special damages, and **$100,000 in punitive damages**. (Is)

Case S28: *Donald Santiago v. Cleveland King, State of Hawaii* (judgment 12/3/92). Plaintiff Santiago, a 47-year-old former construction worker, and defendant Cleveland King were both inmates at Halawa High Security Facility. Plaintiff was classified as medium security, and King was one step short of the highest security level (with a history of convictions of rape, and assault and attacks on guards). Because of overcrowding, plaintiff was moved to the high security facility. At lunchtime, the inmates' cell doors were opened to permit them to eat in a common area. Plaintiff, handicapped by a back condition, was making his way down the stairs when King, unprovoked, "suddenly drove a sharp pencil into plaintiff's left eye causing him to fall eight feet to the concrete floor." Plaintiff suffered a ruptured globe, requiring enucleation (removal), aggravation of his pre-existing back injury, and emotional distress. King defaulted. After seven days of jury-waived trial, Circuit Court Judge Wendell Huddy found King and the State equally at fault and jointly and severally liable for plaintiff's injuries, rejecting the State's discretionary function exception defense. Judge Huddy entered judgment for plaintiff of $250,000 in general damages, no special damages, and **$250,000 in punitive damages** (against King only). (The Court also found King liable to the State on its cross-claim for $250,000 because King defaulted.) (I) & (State)

Case C9: *Ednalyn Panganiban v. Mark Faulise* (CAAP Judgment entered 3/22/95). In this assault and battery case, defendant admitted that he induced plaintiff, his former girlfriend, to take a ride with him, drove her to a pineapple field, committed assault and battery on her, and then left her in the field late at night. Defendant subsequently continued to pressure and intimidate plaintiff. (Criminal charges were later filed against defendant, and plaintiff received some compensation from the criminal compensation program.) CAAP Arbitrator William Bordner found that plaintiff was not comparatively negligent, and awarded her $3,000 in general damages, $561 in special damages, **$3,000 in punitive damages**, and $1000 in costs. (I)

Case C10: *Alfred Ching v. Martin John Yan-To Wong and Hawaii Newspaper Agency, Liberty Newspaper Limited dba Star Bulletin* (CAAP Judgment entered 11/9/95). Plaintiff alleged that he was injured when defendant Wong, a 30-year-old Honolulu Star Bulletin newspaper delivery employee, tackled him to the ground after Wong and Ching's wife had a heated conversation. Plaintiff, who had an amputated foot from vascular disorders, suffered serious injuries, including back strain, lacerations, stroke symptoms, and blurred vision. CAAP Arbitrator Carolyn Wilson apportioned liability 0% to plaintiff, 95% to Wong, and 5% to the employing newspaper. She awarded plaintiff $10,000 in general damages, $10,849 in special damages, and **$5,000 in punitive damages**. (I) & (B)

Case S32: *Raymond H. Kim and James K. Fong v. Nova International Hawaii Co., Ltd., d/b/a Maharaja* (judgment 1/4/96). Plaintiffs Kim and Fong were business visitors during the early morning hours of January 29, 1992 at defendant Maharaja nightclub, which had a strict dress code for hosts (tuxedos) and guests (sports coats for males). Defendant permitted Dean Chung, a host, and his friends to enter the premises wearing shorts and t-shirts, and served him alcohol. Without provocation, Chung challenged Kim to a fight, and when plaintiffs and their girlfriends attempted to leave the premises to avoid Chung, Chung and his friends choked Kim and hit him on the head with a beer bottle. When plaintiff Fong came to Kim's aid, Fong was also assaulted. Defendant's hosts failed to intervene or stop the assault. Plaintiff Fong, a 34-year-old married sales manager, suffered multiple contusions, abrasions, and hematomas. Plaintiff Kim, a 27-year-old single account executive, suffered lacerations to his scalp, cervical strain, and multiple contusions. Circuit Court Judge Marie Milks denied defendant's motion for a directed verdict on punitive damages, finding that defendant ratified the acts and omissions of its employees, and that the evidence presented clear and convincing evidence upon which the jury could render a verdict of punitive damages. After a seven-day trial, the jury entered a verdict for the plaintiffs, finding: 1) for Fong, general damages of $3,750, special damages of $750, and **punitive damages of $15,000**; 2) for Kim, general damages of $1000, special damages of $1,900, and **punitive damages of $10,000**. (B)

Case C11: *Keone N. Rosette v. Lino Caling and State of Hawaii Department of Education* (CAAP Judgment entered 11/18/96). Plaintiff Rosette, a 15-year-old student at Aiea High School admitted that he had told a high school security guard that Caling was a (expletive deleted) after Caling

had cited plaintiff for leaving campus without authorization. The other guard relayed the insult to Caling, who then assaulted plaintiff while allegedly escorting him to the Vice-Principal's office regarding the earlier incident. Plaintiff alleged that Caling choked him, pushed him up against the wall, and struck him in the face with the antenna of his walkie-talkie. Default judgment was entered against Caling, and the issue focused on the State's liability for negligent hiring and training of Caling. CAAP Arbitrator Jeffrey Sia apportioned negligence 5% to plaintiff, 70% to Caling, and 25% to the State. He awarded plaintiff $13,300 in general damages, $7,640 in special damages, and **$23,750 in punitive damages** (against Caling only).[568] (Ultimately, the State settled with the plaintiff, but the judgment was still entered.) (I) & (State)

Case C12: *Blair A. Hubert v. Spotts Cleaning, Victor Young, Compadres dba Mexican Bar and Grill* (CAAP Judgment entered 4/10/97). Plaintiff Hubert, a 32-year-old bartender at Compadres Mexican Bar and Grill in Lahaina, Maui, alleged that, while he was waiting for a mainland flight, he stopped by the Sunset Grill in Honolulu, where he had previously worked as a bartender, to kill some time. He then visited the night club Studebakers, had a few drinks, and returned to Sunset Grill to pick up his luggage early in the morning. While he was there, defendant Victor Young of Spotts Cleaning was cleaning the premises. Hubert claimed he sat down at a table, observed that Young was drinking at the bar, fell asleep and then was awakened when Young was touching him sexually. Hubert claimed he tried to push Young away, but Young bit him on the back, smashed a bottle on his head, and left him in a pool of blood, where he was found by the police. Young denied liability, claiming plaintiff was the aggressor. CAAP Arbitrator John Roney found plaintiff 0% negligent, Spotts 0% negligent, and Young 100% at fault. Roney entered an award for plaintiff against Young of $15,000 in general damages, $11,658 for special damages, **punitive damages of $5,000**, and costs of $3,730. (Bs) & (I)

Case S34: *Kerry Mcauley v., Robert Sonke, Outrigger Hotels USA, Inc., and John Pederson, Ltd., dba Shorebird Bar and Restaurant* (judgment entered 7/23/97). Plaintiff Kerry Mcauley, a 30-year-old single advertising manager visiting Waikiki, alleged claims of assault and battery, negligent/intentional infliction of emotional distress, and public accommodation discrimination based on sex. The incident occurred when

[568] Note that the description of the award and the listed award do not match on the verdict sheet.

plaintiff was walking past defendant Shorebird's bar. Three men were rating females as they walked by, assigning numbers of napkins and holding them up to view. Plaintiff was insulted by the demeaning activity ("she rated 8 out of 10"), and jokingly tossed her shoe at the men. When she went to retrieve her shoe(s), defendant Sonke punched her and pushed her to the ground, continuing to abuse her until some men from the beach came up to her aid. Plaintiff alleged that defendants Outrigger and Shorebird were negligent for failing to provide security and come to her aid, and that Shorebird had notice of the men's offensive behavior prior to the incident. Plaintiff suffered back injuries, trauma, depression, septal injury, contusions, abrasions, and black and blue eyes. After a ten-day trial, Circuit Court Judge Gail C. Nakatani granted a directed verdict to defendant Outrigger. The jury found for plaintiff, apportioning her 20% fault, 55% to Sonke, and 25% to Shorebird, awarding general damages of $49,600, special damages of $16,000, and **punitive damages of $62,000** (against Sonke only). (I) & (Bs)

Case C14: *Jane Doe and John Doe v. Harrison Mew and Arcade Terrado* (CAAP Judgment entered 9/28/00). Plaintiffs husband and wife, a military couple who had transferred to Hawaii, visited defendant Mew's Island Auto Air condition business, where he also operated a jet ski business. Plaintiffs contended that Mew had a modus operandi in which he induced pretty women to model for him on a jet ski and then took advantage of them when they were under the influence of alcohol. Mew allegedly induced Mrs. Doe to return to the business, purportedly to employ her as a model. He invited defendant Terrado to be present the evening when he unlawfully touched and engaged in bodily contact with Mrs. Doe against her will and without her consent. Both defendants later pled guilty to felony and misdemeanor charges of sexual assault. CAAP Arbitrator Gary Yokoyama apportioned fault 0% plaintiffs, 70% Mew, and 30% Terrado. He awarded plaintiffs $10,000 in general damages, no special damages, and a total of **$32,000 in punitive damages** ($30,000 against Mew and $2,000 against Terrado). Mr. Doe received general damages of $2,000 and no punitive damages. (Is)

Case S39: *William K. Takaki, Janina Takaki, and Billie K. Takaki v. Joseph P. Tavares, George E. Cambra, George L. Cambra, Virginia N. Cambra, George Cambra's Movie Production Trucks, Inc., Shafter Pawn, Inc.* (judgment entered 8/29/01). This case involved a notorious dispute over control over Hawaii's lucrative movie production business between two competitors, primary plaintiff William Takaki and primary defendant George L. Camba. Mr. Takaki owned a truck tractor and trailer used for movie

production for movies such as "Jake and the Fatman." In June 1991, Mr. Takaki's truck burned to the ground, as did the truck of another competitor of Mr. Cambra. In March 1999, Cambra and co-defendant Tavares (later dismissed from the civil case) pled guilty to conspiracy to commit arson in burning Takaki's truck. Plaintiffs then filed this civil action contending that Cambra, to prevent his assets from seizure, conspired with his parents, George and Virginia Cambra, to hide assets, and that defendants' actions caused plaintiffs emotional distress, destroyed plaintiffs financially, and forced plaintiffs to file for bankruptcy, resulting in the loss of their home. First Circuit Judge R. Mark Browning dismissed all defendants except for Mr. Cambra. After a six-day trial, the jury found 1) that Cambra engaged in IIED, awarding Mr. Takaki $250,000 in general damages, Mrs. Takaki $100,000, and Billie Takaki $50,000, 2) that Cambra should pay Mr. Takaki $350,000 in general damages and $20,794 for damage to the truck; 3) $450,000 general damages and $60,000 special damages for RICO violations; 4) $1 million general damages and $2.5 million in special damages for intentional interference with plaintiffs' prospective economic advantage; and 5) by clear and convincing evidence, punitive damages of $4,630,794 to Mr. Takaki, $130,000 to Mrs. Takaki, and $25,000 to Billie Takaki. The Court confirmed only the awards for IIED (totalling $400,000) and **punitive damages (totalling $4,785,974)**. (Is) & (Bs)

2. Abuses of Power: Sexual Harassment, Wrongful Termination, Relatiatory Discharge

Case S5: *Ruth I. Sorrell v. Earl Lynn and State of Hawaii* (judgment 9/13/85). In *Sorrell*, the plaintiff, a widowed, self-employed woman, alleged that the defendant Earl Lynn improperly represented himself as a psychiatrist and falsely advised a family court judge about plaintiff's mental status, which resulted in the forcible removal of plaintiff and her 3-year-old grandson from her residence by police. A psychiatric examination at Queen's Medical Center found plaintiff's condition to be "normal." Lynn also harassed Sorrell by attempting to purchase her home and causing property damage. (The court granted the State's motion to dismiss based on discretionary function immunity.) After two days of jury-waived trial, at which defendant failed to appear, Circuit Court Judge Norman Lewis rendered a verdict for the plaintiff, awarding $10,000 in general damages, $691 in special damages, and **$30,000 in punitive damages**. (I/Dr.) & (State)

Case S11: *Eugenie Parnar v. Americana Hotels, Inc., Flagship*

International, Inc., and Mark Liquori (judgment entered 5/26/87). Plaintiff, a 36-year-old single woman who was secretary to the controller (defendant Liquori) of the Ala Moana Hotel alleged that she was fired by Liquori to prevent her from testifying before a grand jury about her awareness of price-fixing activities of defendants and other Hawaii hotels. When he fired plaintiff, Liquori also allegedly suggested that plaintiff move to the mainland and offered her money to do so. Plaintiff alleged severe emotional distress, humiliation, and loss of reputation. Plaintiff appealed the court's order granting summary judgment to defendants, resulting in the Hawaii Supreme Court's decision in *Parnar v. American Hotels, Inc.*, 65 Haw. 370 (1982), which recognized a new public policy exception to the employment at will doctrine. On remand, the jury was instructed that if they found Parnar's discharge was for the purpose of preventing her from testifying in the anti-trust investigation, it was a violation of public policy. After a nine-day trial, the jury returned a special verdict for plaintiff, awarding past/future wage loss of $300,000, emotional distress damages of $275,000, and **punitive damages of $1.5 million** (23% Americana, 67% Flagship, 10% Liquori). (ERs) & (I)

Case C1: *Charleen S. Laronal v. Donald K. Hopper, Beki Catham dba Paradise Personnel, and Susan Greene* (CAAP judgment entered 12/1/88). In this CAAP case, plaintiff Laronal alleged that defendant Paradise Personnel negligently referred her for an employment contract to Nutri-Metics International Corporation, managed by Dennis Hopper. After a few months on the job, Hopper began sexually harassing Laronal, hitting her on the "rump," grabbing her breast, and scratching her chest during a struggle. Hopper was convicted of first degree sexual abuse in February 1987, and plaintiff alleged in her lawsuit that Greene knew or should have known of Hopper's abusive nature and failed to warn her about his deviant behavior. CAAP Arbitrator James T. Estes found that although Paradise and Green breached their duty to warn, their breach was not a substantial factor in plaintiff's injuries because, at the time of the assaults, plaintiff was herself aware of Hopper's deviant sexual behavior. Estes found Hopper was the cause and awarded plaintiff $5,000 in general damages, $8,318 in special damages, and **$5,000 in punitive damages against Hopper**. (Ultimately, however, plaintiff collected no damages because Hopper's estate had previously settled with plaintiff for $5,000, remaining as a nominal defendant in the case for purposes of apportioning negligence.) (Is) & (B)

Case C16: *Betty J. Floyd v. Wakenhut of Hawaii* (judgment entered 5/22/91). Plaintiff Betty J. Floyd, a married 63-year-old woman, employed as

an airport security screener at the Kona Airport, was a Seventh-Day Adventist. She contended that when she was hired in 1989, she had an agreement with her supervisor not to schedule her to work during her sabbath (from Friday night to Saturday night), but in 1990, a new supervisor told her she should have to work the weekends, including her sabbath, and that she was forced to quit. She alleged constructive discharge in violation of public policy, HAW. REV. ST. § 378-2, and the Hawaii Constitution. Defendant denied that there was any special agreement and contended that all other screeners worked six days a week. After a one-day hearing, CAAP arbitrator Jeanne L. Hughes found defendant liable and awarded special damages of $3113.89 (difference in pay) and **punitive damages of $5,000**. (Plaintiff had a stroke after her termination and refused defendant's offer of re-employment.) (B/ER)

Case S25: *Francis R. Calleon v. Hiroo "Woody" Miyagi and MTL, Inc.* (judgment entered 5/6/92). Plaintiff Francis Calleon, a single 42-year-old General Superintendent of Maintenance of MTL (the Honolulu bus company), alleged that he was wrongfully fired by Miyage, MTL's Chief Executive, after four years of employment after Calleon complained about three violations of public policy and other violations by MTL (such as preferential treatment to supplies who contributed to Mayor Fasi's campaign, improper overtime and training, and improper inventory practices that could hide thefts). Calleon alleged retaliatory discharge, violations of the state whistle blower statute, breach of contract, defamation, negligent/intentional infliction of emotional distress, and fraud/misrepresentation. After a 20-day trial, the jury awarded plaintiff compensatory damages of $450,000, attorneys fees/costs and prejudgment interest of $194,510, and **punitive damages of $150,000 ($100,000 against MTL and $50,000 against Miyage)**. (I) & (B)

Case S33: *Karen Sullivan v. South Seas Motors, Inc.* (judgment entered 3/29/96). Plaintiff Sullivan, a 49-year-old single sales manager for defendant South Seas Motors, claimed that defendant demoted and then fired her because of her age and sex. Plaintiff alleged that defendant's vice president Steve Robin told plaintiff, who had an excellent performance rating and had been promoted during six years of employment with South Seas Motors to general sales manager in charge of three dealerships, that he was demoting her (to the Kaneohe dealership, which was due to close) to recruit new superstar sales managers who would be unwilling to work for a woman. Plaintiff, who was replaced by two younger men, filed the complaint after receiving a right to sue letter from the Hawaii Civil Rights Commission. Plaintiff alleged that

she suffered major depression, attempted suicide by ingesting rat poison and turpentine, cutting her neck and wrist, and tying a plastic bag over her head. After a ten-day trial, the jury returned a special verdict for plaintiff, finding sex or age was a substantial factor in the discharge of plaintiff and that she suffered emotional damages as a result. The jury awarded plaintiff $362,000 in general damages, $150,000 in past wage losses, $800,000 in future wage losses, and **$500,000 in punitive damages**. (Circuit Court Judge Herbert Shimabukuro also awarded plaintiff $143,000 in attorneys fees and costs and $26,000 in pre-judgment interest.) (B/ER)

Case F4: *Maria Arceneaux v. Hotel Employees & Restaurant Employees Local 5 Union; Larry Kaneshiro, and Elwood Mott* (Federal Judgement entered 11/25/96). Plaintiff, a 39-year-old female labor organizer, sued her employer, Local 5, for a myriad of federal and state tort and statutory claims stemming from sexual harassment by defendant Kaneshiro and defendant Mott on the job, which she claimed created a hostile work environment. She also alleged wrongful termination when she and four other females were terminated, allegedly under a pretext of a reduction in force. Although many claims were dropped before trial, a jury still held in favor of plaintiff, finding Local 5 and Kaneshiro liable for sexual harassment, assault and battery, and intentional infliction of emotional distress. The jury awarded plaintiff $12,000 in general damages, no special damages, and **$60,000 in punitive damages ($50,000 against Local 5 and $10,000 against Kaneshiro)**. Federal Court Judge Helen Gillmore entered the jury's award as judgment in favor of plaintiff. (Union) & (Is)

Case S35: *Charles Schefke v. Reliable Collection Agency Ltd., Pacific Medical Collections, Inc., Jonathan Kirschner, Fred Kirschner* (judgment entered 10/10/97). Plaintiff, a 63-year-old married man was hired by defendants (Reliable in 1986; Pacific in 1988) as a collections agent on a salary and commission basis. After plaintiff filed an age discrimination complaint with the Hawaii Civil Rights Commission and received a right to sue letter, he was locked out of his office, did not receive a bonus that was given to all other employees, was otherwise retaliated against by defendants, and was wrongfully terminated. Although Circuit Court Judge Dan Kochi granted a directed verdict to defendants on the age discrimination claim, after a seven-day trial, the jury found that Reliable and Pacific had failed to pay plaintiff wages, and found that Pacific had retaliated against plaintiff for filing the civil rights complaint, awarding a total of $32,256.50 against Reliable, and $472,635.67 against Pacific, which included a **punitive damages award**

of $300,000 against Pacific only. (Bs) & (Is)

Case F5: *Sylvia Mano v. Hawaii Teamsters and Allied Workers Union, Local 996, Mel Kahele, Ronan Kozuma, and Hawaii Teamsters Staff Organization* (Federal Court judgment entered 12/21/98). Plaintiff, a 58-year-old female employed as a union senior business agent, alleged that she was wrongfully terminated by her union's President, defendant Kahele, because of her political and/or union affiliation and failing to support his bid for re-election. She also alleged the Kahele fired her under a pretext and defamed her by spreading false stories about her acts of dishonesty in accounting for the distribution of t-shirts to union members. After an eight-day trial, the federal court jury found for plaintiff. The jury awarded her $45,000 in back pay and benefits, $118,750 in compensatory damages, and **$100,000 in punitive damages ($25,000 for wrongful termination and $75,000 for defamation, allocated 90% to Kahele 90% and 10% to Kozuma).** (Union) & Is/ER)

Case S37: *Nancy Lelia Wilder v. Paul Brown International Ltd., Paul Brown, individually* (judgment entered 7/21/99). Plaintiff, a 38-year-old single woman who was the Cosmetics Director for Paul Brown, alleged that she was subjected to sexual harassment (touching, exposing, and verbal comments on and off salon premises), intentional infliction of emotional distress, and assault and battery by Paul Brown, which created a hostile work environment resulting in her constructive discharge and caused her clinical depression. After a six-day trial, the jury found for plaintiff on the assault count and for defendant on the sexual harassment, battery, and intentional infliction of emotional distress counts. The jury awarded plaintiff $3,262.34 in general damages, $632.68 in special damages, reduced the award by $994.25 for failure to mitigate, and awarded **punitive damages of $100,000 (reduced by Circuit Court Judge Kevin S.C. Chang to $50,000).** (B) & (I)

Case S38: *Chad K. and Jamie Awai v. Interstate Cleaning Corp., William Cariaga* (judgment entered 8/30/99). Plaintiffs 22-year-old part-time night janitor Chad K. Awai alleged that his supervisor defendant William Cariaga, a homosexual, sexually harassed him on the job, causing severe emotional distress. Mrs. Awai also claimed severe emotional distress from outrageous remarks Cariaga directed at her in person and over the phone. Mr. Awai claimed the unwelcome advances by Cariaga created a hostile work environment and forced him to quit his job. After eight days of trial, the jury found for plaintiffs, and awarded Mr. Awai $607.50 in lost wages, $125,000

in compensatory damages (against Interstate) (reduced by Circuit Court Judge Rhonda Nishimura to $40,000) and **$15,000 in punitive damages**; Mrs. Awai $10,000 in compensatory damages. (B) & (I/ER)

3. Reckless and Intoxicated Drivers: DUIs and Speeders

Case S1: *Charles H. Nakagawa, and Carolyn Nakagawa, Special Administrator of the Estate of Scott R. Nakagawa v. Wayne Chevas and Grace Chevas* (judgment entered 5/2/85). In the early morning hours of May 15, 1985, decedent Scott Nakagawa, a 28-year-old single self-employed attorney, was a passenger in his Porsche 924, hearing mauka on Kaohi Street, entering the intersection of Moanalua Road, when his vehicle was struck broadside on the passenger's side by a 1970 Gremlin heading 'ewa on Moanalua Road, driven by Wayne Chevas. Scott died at the scene. The parties disputed who had the green light. (Third-party defendant Dean Kakazu, the driver of Scott's Porsche settled with the third-party plaintiffs for $125,000 on the second day of trial on the contribution claim and was dismissed.) Defendants admitted liability and the only issue tried was damages. After a five-day trial, the jury rendered a verdict for Scott's estate of special damages of $12,810.99, excess earnings of $1,200,000, and **punitive damages of $2,500.** (Is)

Case S2: *Thong Sananikone, as guardian ad litem for Nang Boun My v. Darrell R. Large* (judgment entered 5/10/85). On July 26, 1983, Nang Boun My was a passenger in her nephew's Honda Civic stopped at a red light on Kalanianaole Highway when their vehicle was rear-ended by defendant's Mercedes Benz. Plaintiff alleged the cervical strain caused general health, walking, and mental/stress problems and that, previous to the accident, she was active and vigorous. A guardian was appointed for My, a widowed retired housewife, approximately 93 years old, who could not speak or read English. Plaintiff alleged that defendant, who had two prior DUI convictions, was intoxicated. Defendant admitted liability. After a six day trial, the jury awarded plaintiff $47,020.12 in general and special damages, and **$75,000 in punitive damages.** (I)

Case S13: *Raynette M. Cuson and Bernadette Gonzales v. Edward Agag* (judgment entered 11/5/87). In this hit and run DUI case, plaintiffs alleged that, at 11:50 a.m., Agag drove a friend's black 1974 Toyota onto the sidewalk and lawn at Farrington High School, where he ran down the plaintiffs who were walking on the lawn. Defendant then fled the scene,

traveling through the hallway, the lawn, and back onto the roadway, where about 20 minutes later, he crashed the car into a fence/pole. Defendant was later found to have a BAC of .271. Plaintiff Cuson, an 18-year-old single female student, suffered several physical injuries resulting in permanent partial disability. A default judgment was entered against defendant and Circuit Court Judge Ronald Moon then held a non-jury trial on the issue of damages. Plaintiff Gonzales settled before trial and plaintiff Cuson withdrew her special damages request. After a one-day trial, Judge Moon awarded plaintiff Cuson $275,000 in general damages and **punitive damages of $7,500.** (I)

Case S15: *Keith E. Reder, individually and as next friend for Christina Ann Reder, Donna Lyn Reder v. Daniel Seyler, MarionWong* (judgment entered 2/18/88). In this hit and run DUI case, plaintiff, a 28-year-old married nurse, Donna Reder was driving her car with her 2-year-old her infant daughter in a car seat. As Reder entered Kahekili Highway, defendant Seyler, in a rented vehicle, failed to stop at the red signal, swerved into the right-turn only lane, ran the red signal, attempted to cross the intersection, collided with the right side of plaintiffs' vehicle, then he and his passenger (defendant Wong) fled the scene after retrieving beer from the vehicle. Plaintiff Donna Reder suffered back pain and cervical strain. Her daughter suffered a double hernia, requiring surgery, and inflicting emotional distress. Plaintiff Keith Reder, a 28-year-old manager, who was the husband/father, arrived at the scene immediately after the accident and claimed emotional distress and loss of consortium. Seyler was later apprehended by police, speeding and drinking alcohol; he had previous convictions for DUI and was driving on the date of the accident with a suspended license. (Wong, who was also the rental agent who rented the vehicle to Seyler a few days earlier, was granted a directed verdict on the count of negligent entrustment.) Seyler admitted liability before trial and never appeared at this deposition or trial. After an eight-day trial, the jury awarded: 1) to the father, general damages of $100, special damages of $1,650 (auto), and **punitive damages of $2,000**; 2) to the daughter, general damages of $3,000, special damages of $2,663.08, and **punitive damages of $7,500**; 3) to the mother, general damages of $7,500, special damages of $62.04, and **punitive damages of $5,500.** (Is)

Case S17: *Annette Tilton, individually and as Prochein Ami of Geraldine Tilton, a minor; Patricia Tilton, individually and as Prochein Ami of Kelii Tilton, a minor; Louis K.C. Tilton, individually and as Prochein Ami of Billie Jo Tilton, a minor (consolidated) v. Raymond J. Rivera, Jr.,* (judgment

entered 4/25/88). In this motor vehicle accident case, the three minor plaintiffs (ages 14, 11, and 11) were injured when the van in which they were passengers was rear-ended by defendant, whom plaintiffs alleged was speeding and had a BLOH of .17. Defendant admitted liability before trial. After six days of trial, the jury awarded: 1) to Annette/Geraldine, general damages of $1,500, special damages of $627.91, and **punitive damages of $1.00**; 2) to Patricia/Kelii, general damages of $650, special damages of $106.08, and **punitive damages of $1.00**; and 3) to Louis/Billie Jo, general damages of $1,000, special damages of $227.78, and **punitive damages of $1.00**. Plaintiffs argued that their claim came under the "punitive damages exception" to the abolition of tort liability for automobile accidents (HAW. REV. STAT. § 294-6(b)(3), superseded by HAW. REV. STAT. § 431:10C-306), and Circuit Court Judge Ronald Moon instructed the jury that plaintiffs had to prove and be awarded punitive damages in order to recover any damages against the defendant. (I)

Case S18: *Mildred H. Uyeoka, individually and as Guardian Ad Litem for Jon H. Oshiro v. William E. Kinkaid* (judgment entered 6/30/88). At 11:15 p.m. on October 25, 1985, plaintiff Jon Oshiro, a 23-year-old single man, was driving a car west on Kalanianaole Highway in the land next to the double solid center lines, when defendant, driving east, attempted to pass east-bound traffic by crossing the center lines into the lane Oshiro was occupying. Oshiro attempted to avoid the accident, but Kinkaid crashed into him head-on. Plaintiff suffered catastrophic injuries, including severe brain damage, permanent paralysis on his left side, severe speech and memory defects, confinement to a wheelchair, lack of bowel and bladder control, mental incompetence, and various fractures. Plaintiff contended defendant was drunk (.241 BLOH), was speeding, in the wrong lane, and was fleeing from the scene of another vehicle collision that he caused when he collided with Oshiro. Defendant, who claimed he had no insurance and minimal assets, stipulated before trial to the fact that he had ignored a friend's warning not to drive while drunk, that his BLOH was .241, and that he was the sole and proximate cause of the accident. After a one-day jury waived trial, Circuit Court Judge Marie N. Milks awarded: 1) to plaintiff Oshiro (son) general damages of $2.97 million, special damages of $990,000, and **punitive damages of $25,000**; and 2) to plaintiff Mildred (mother), $322,000 general damages. (I)

Case C3: *Mark D. Searles v. Perry P. Sweeny* (CAAP Judgment entered 10/6/88). Defendant Sweeny admitted that he rear-ended plaintiff's vehicle

on Kalanianaole Highway in Kailua and that he fled the scene after the accident. Defendant contested only the issues of apportionment of damages because plaintiff had suffered another vehicle accident one week later, aggravating his back injuries. CAAP Arbitrator Michael O'Connor found after a one-day hearing that defendant was 100% at fault and attributed 60% of plaintiff's injuries to the rear-end accident, awarding $15,000 in general damages, $12,000 in special damages, and **$2,000 in punitive damages.** (I)

Case C4: *Garret K. Ito and Ross A. Keliikipi v. Dwight Daniel Esias* (CAAP Judgment entered 5/17/89). In this CAAP case, plaintiffs contended that they suffered cervical strain after they were rear-ended by defendant late one night when they were heading toward Kailua on the Pali Highway. Police cars had stopped all traffic because a tree had fallen on the road in a storm. Plaintiffs alleged that defendant was holding two jobs, had not slept the previous night, had been out drinking before the accident, saw the police cars, but then closed his eyes and fell asleep. CAAP Arbitrator Richard Chun found defendant liable, awarding plaintiffs $14,000 in general damages, $5,252 in special damages, and **$1.00 in punitive damages.** (Plaintiffs had argued that their claims fell under the punitive damages exception to the no-fault law.) (I)

Case C13: *Margarat Yuson v. Huong Thi Bui and Linh Hi Bui, individually and as Guardians for David L. Bui, minor, Inja N Choi and Henry Kyo Sik Choi, individuall and as Guardians for Rex Choi, minor* (CAAP Judgment entered 11/15/99). Plaintiff Yuson, a 58-year-old woman was driving east on the H-1 Freeway one evening, when her vehicle was violently rear-ended by minor David L. Bui, who was racing his vehicle with Rex Choi at speeds up to 80 mph, on their way back from Hawaii Raceway Park. In trying to change lanes, Bui struck plaintiff's car and Bui's vehicle burst into flames. Plaintiff suffered aggravation of post-traumatic stress disorder, panic attacks, soft tissue injuries, and aggravation of a pre-existing back injury, as well as cervical strain. Bui denied racing, but admitted liability; Choi denied both. CAAP Arbitrator William Wynhoff apportioned fault 50% to Bui and 50% to Choi.[569] Wynhoff awarded plaintiff $60,000 in general damages, $19,180 in special damages, and **$15,000 in punitive damages.** (Is)

[569] Apparently, no finding was entered with respect to the obvious joint and several liability of the defendants based on concert of action.

Case C15: *Herminia Subia v. Stanley Batula* (CAAP Judgment entered 9/13/01). Plaintiff, a 37-year-old hotel worker, was driving her car on Likelike Highway in the early evening, when she stopped at a red light. When the light turned green, before she had a chance to accelerate, defendant rear-ended her vehicle. Plaintiff suffered cervical and shoulder strain, and temporary work disability. Defendant later admitted he had drank 2-3 beers earlier that afternoon. The police report indicated that he failed the field sobriety test and had a .13 BLOH shortly after the accident. Defendant admitted liability, disputing only the amount of damages. CAAP Arbitrator Harrison P. Chung found no comparative negligence and awarded plaintiff $13,000 in general damages, $10,000 in special damages, and **$12,000 in punitive damages.** (I)

4. Gross Negligence: Dog Bites, Shorebreak Accidents, Medical Fraud, Workplace Injury

Case S6: *Howard P. Kanehe and Nannie V. Kanehe v. Jeff Brisebois, Mary Brisebois, Waihina Valley Farms* (judgment entered 1/22/86). In this Kauai case, the plaintiffs alleged that, while Mr. Kanehe was walking near defendants' property, he was attacked and bitten by defendants' Akita. Mr. Kanehe suffered a puncture wound to his left testicle; puncture wounds to his left thigh; lacerations on his wrist; two puncture wounds to his palm; and residual neurological problems with his left hand. Plaintiffs contended that the dog (or defendants' four Akitas) had previously bitten five people, including Mr. Kanehe's grandson. Defendant Mr. Brisebois contended he had released the dog on the corporation's own property for exercise, with no notice that Mr. Kanehe, whom defendant claimed was trespassing, has entered the property. After a three-day trial, the jury found that defendants were negligent and that plaintiff was not. The jury awarded general damages of $30,000, special damages of $300, and **punitive damages of $75,000 ($52,500 against Mr. Brisebois, $15,000 against Mrs. Brisebois, and $7,500 against the corporation).** (Is) & (B)

Case S23: *Charles William Chase, Jr., and Carla Marshall Chase v. State of Hawaii, County of Maui, Association of Apartment Owners of the Whaler on Kaanapali Beach* (judgment entered 1/01/90). In this shorebreak liability case, plaintiff Charles Chase, a 34-year-old electrician and his wife Carla, both residents of Nevada, were visiting Kaanapali Beach on Maui for an outing and chose to stop on the beach in front of defendant Whaler's condominium. Body-surfing alone in chest-high water with two to four foot

waves, Charles was catapulted by a wave and suffered severe back and spinal injuries, resulting in permanent pain and partial disability. Plaintiffs dismissed their claims against the State and County, and the case proceeded to nine days trial against Whaler, based on plaintiff's claims of inadequate notice and warning. Second Circuit Court Judge Richard Komo admitted evidence of a prior lawsuit against Whaler for a similar injury to a guest, as well as evidence of 86 prior ocean accidents in the area, including 20-22 that occurred in front of the Whaler property. The jury awarded Charles general damages of $260,000, special damages of $22,750, **punitive damages of $440,000**, and Carla loss of consortium of $71,500. (State) & (County) & (B/AOAO)

Case F2: *Norman L. Mitchell and Miriam Mitchell v. Physicians Health Plan of Minnesota and Westin Hotels dba Mauna Kea Beach Hotel* (Federal Court Judgment entered 8/7/90). Plaintiff and his wife were guests at defendant Mauna Kea Beach Hotel, when Mr. Mitchell went for a swim in the ocean fronting the hotel. As a result of a wave throwing him to the bottom, he suffered total permanent quadriplegia. He alleged the hotel failed to warn of the deceptively dangerous ocean conditions and that the hotel knew of 137 prior accidents, including 3 quadriplegic accidents, at the same site in front of the hotel. After a 13-day trial, the jury found him 47% negligent and the hotel 53% negligent, awarding $3.7 million in special damages, $2 million in general damages, and **$3 million in punitive damages**. Mrs. Mitchell was awarded $1 million for loss of consortium and $2.5 million for NIED (witness to the accident). (Bs)

Case S26: *Janie Ditto v. John A. McCurdy, Jr., M.D., and Karla Scarpiova* (judgment entered 7/7/92; on remand, punitive damages judgment modified to $676,700, July 1999; the original and not the modified judgment is included in the quantitative portion of the study; in 2002, the Supreme Court vacated this second judgment as well). Plaintiff Janie Ditto, a 32-year-old married bar hostess, brought a lawsuit against defedant Dr. McCurdy, a surgeon who performed breast augmentation surgery on Ditto, and against McCurdy's nurse Scarpiova. Because of complications that plaintiff alleged resulted from defendant McCurdy's inadequate care, plaintiff underwent three surgeries under general anesthesia on the initial day of surgery because of complications; she contracted an infection in the right breast; underwent a closed capsulotomy (manual breast manipulation to break up scar tissue), a bilateral open capsulotomy (surgical procedure to break up scar tissue around implants); had her surgical incision re-sutured by Scarpiova, an unlicensed

medical assistant; underwent two more capsulotomies; developed a hematoma that was aspirated; and ultimately had the implants removed by other physicians. Plaintiff alleged that McCurdy (a surgeon who had performed several hundred of such operations but whose board certification was not recognized by the American Board of Medical Specialties) lacked the requisite expertise to perform breast augmentation, failed to obtain plaintiff's complete medical history, and failed to warn plaintiff of the risks of the procedure. After a fourteen-day trial, the jury awarded plaintiff $1.0 million in general damages, $3,500 in special damages, $400,000 for fraud, and **punitive damages of $600,000**. (Dr) & (I)

Post-Trial History. The case history after this 1992 judgment is very convoluted, involving four Hawaii Supreme Court opinions, one ICA opinion, bankruptcy proceedings, and numerous circuit court proceedings on remand. As explained below, the amount of plaintiff's punitive damages award is still unsettled and awaiting retrial on a second remand.

After entry of the jury's verdict as judgment, the trial judge awarded plaintiff Ditto $743,381.92 in prejudgment interest (order of September 9, 1992), and $42,106.39 in costs (order of September 17, 1992).[570]

On October 20, 1992, McCurdy filed for bankruptcy under Chapter 11, which was later converted to a Chapter 7 liquidation, automatically staying the judgment against him.[571]

On August 9, 1993, McCurdy's subsequent motions for new trial, JNOV, and reconsideration in the circuit court were denied, and the trial court entered its amended judgment (reflecting the award of prejudgment interest and costs).[572]

Defendant McCurdy then appealed on several grounds. The appeal was assigned to the Intermediate Court of Appeals ("ICA"). As to punitive damages, the ICA held, in an opinion issued in June 1997, that the punitive damage award was supported by evidence and was not excessive, and the evidence of the surgeon's financial condition (which he failed to introduce) was not required to support the award.[573]

Accordingly, the ICA affirmed the amended August 9, 1993 judgment that awarded special, general, and punitive damages for negligence, and reversed the portion of the amended judgment that awarded prejudgment interest

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[570] For a discussion of the case history, see *Ditto v. McCurdy*, 947 P.2d 961, 968 n.1 (Haw. 1997) (*Ditto I*).

[571] For a discussion of the case history, see *Ditto v. McCurdy*, 978 P.2d 783 (Haw. 1999) (*Ditto III*).

[572] *Ditto I*, 947 P.2d at 971.

[573] *Ditto I*, 947 P.2d at 972-75.

damages on punitive damages.[574]

In 1997, Ditto also obtained partial relief from the bankruptcy stay in order to garnish Dr. McCurdy's pension plans (which became the subject of the garnishee action appealed to the Supreme Court, described below).[575]

Defendant sought and obtained review of the ICA's 1993 opinion in the Hawaii Supreme Court. On November 6, 1997, the Court held, as to punitive damages, that the trial court's fraud instruction was harmless with respect to the jury's findings as to negligence and gross negligence and strongly endorsed the merits of the award: "we determine that there was, indeed, an abundance of clear and convincing evidence upon which the jury could rely to find that Dr. McCurdy's care of Ditto, from the outset, was grossly negligent and therefore reckless and consciously indifferent to the consequences that could arise," and "the evidence of Dr. McCurdy's gross negligence was so overwhelming and of such an egregious nature that the jury certainly could have found that punitive damage was warranted."[576] However, the Court held that the fraud instruction had prejudicially influenced the jury's calculation of punitive damages.[577]

Accordingly, the Court vacated the jury's 1992 award of punitive damages and remanded with instructions to the trial court to dismiss the fraud count and conduct a new trial solely on the issue of the amount of punitive damages owed.[578]

On January 7, 1998, the Supreme Court entered a notice and judgment on appeal, stating in pertinent part that interest at ten percent per year, pursuant to HAW. REV. STAT § 478-3 (1993), should be applied to the affirmed portion of the verdict, $1,045,606.30 (*i.e.* $1,003,500 in general and special damages for negligence and $42,106.39 in costs not appealed) from the date of the July 1992 judgment.[579]

In 1998, plaintiff Ditto attempted to recover the valid portions of her judgment from the defendant. In August and September 1998, the circuit court partially granted plaintiff's motion for issuance of a garnishee summons, entered a garnishee order, and denied McCurdy's motion for stay on appeal and for interlocutory appeal.[580] McCurdy appealed.

On May 12, 1999, the Hawaii Supreme Court found that ERISA protected

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[574] *Id.* at 995.
[575] *Ditto III*, 978 P.2d at 785.
[576] *Id.* at 960.
[577] Ditto v. McCurdy, 947 P.2d 952, 959-61 (Haw.1997), *recons. denied* (1997) (*Ditto II*).
[578] *Id.* at 961.
[579] *See* Ditto v. McCurdy, 80 P.3d 974, 976 (Haw. 2003) (*Ditto VI*).
[580] *Ditto III*, 978 P.2d at 785.

Dr. McCurdy's two pension plans from garnishment and therefore reversed the circuit court's 1998 garnishee orders.[581]

On June 3, 1999, the retrial of the punitive damage awards commenced in the circuit court.[582] Ditto's counsel argued that the favorable language of the Supreme Court's 1997 decision, essentially pre-determined the jury's reconsideration of the punitive damages award; McCurdy's counsel argued that the circuit court gave it too much credence in instructing the jury and allowed plaintiff's counsel to over-emphasize it during closing argument.[583] In July 1999, the jury returned **a punitive damages verdict for $676,700.**[584] Final judgment for this amount was entered on July 14, 1999.[585] Following the trial court's denial of his motion for a new trial, McCurdy timely appealed.[586]

On November 19, 1999, the circuit court judge issued a writ of execution in connection with the judgments allowing Ditto to seize McCurdy's personal property on Maui and in Honolulu.[587] McCurdy moved to quash the writ. On June 19, 2000, the circuit court judge denied in part and granted in part the motion to quash.[588] McCurdy appealed.

On March 24, 2000, the circuit court issued an order granting in part and denying in part McCurdy and his pension plan's motion for return of garnished funds and for attorneys fees and costs, and entered a September 28, 2000 "final" judgment.[589] On November 20, 2000, the circuit court also denied Ditto's motion to set aside and/or to alter the judgment, from which Ditto appealed.[590]

In an April 8, 2002 decision on McCurdy's appeal of the retrial of the punitive damages award, the Hawaii Supreme Court held that the trial court erred in taking judicial notice of the Supreme Court's discussion in the prior appeal concerning sufficiency of evidence necessary to affirm McCurdy's liability for punitive damages, and that the error was harmful.[591] The Court, once again, vacated in part and remanded for another retrial on the amount of punitive damages.[592]

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[581] *Ditto III*, 978 P.2d at 797.
[582] *See* Ditto v. McCurdy, 44 P.3d 274, 276 (Haw. 2002) (*Ditto IV*).
[583] *Id.* at 276-78.
[584] *Id.* at 278.
[585] *Id.*
[586] *Id.* at 279.
[587] *See* Ditto v. McCurdy, 78 P.3d at 331, 332 (Haw. 2003) (*Ditto V*).
[588] *Id.* at 333.
[589] *Ditto VI*, 80 P.3d at 976.
[590] *Id.*
[591] *Ditto IV*, 44 P.3d at 275.
[592] *Id.* at 283.

On October 30, 2003, the Hawaii Supreme Court addressed McCurdy's appeal regarding the writs of execution issued by the circuit court in 2000.[593] The Court held for McCurdy that the writ of execution was invalid for vagueness and untimeliness, and reversed the circuit court's order denying McCurdy's motion to quash.[594]

In December 2003, the Hawaii Supreme Court addressed the parties' appeal regarding the March 2000 and September 2000 orders regarding garnishment of Dr. McCurdy's pension plans, and Ditto's appeal of the November 2002 order, dismissing all of the appeals on jurisdictional grounds and upholding the circuit court's orders.[595]

In short, as of the last reported decision, plaintiff Ditto's entitlement to punitive damages is well established but the amount of that award has yet to be retried for the third time in the circuit court. Her other damages, including post-judgment interest are around $2 million, of which it appears she has collected only $66,000 since the judgment over ten years ago.[596]

Case C17: *Debbie Hart v. Dr. Michael C. Pierner, D.C.* (judgment entered 10/14/94). Plaintiff Debbie Hart, a 33-year-old single female, was a licensed massage therapist under contract to provide services in the office of the defendant. In early January 1990, she had a car accident. Four days later, defendant Pierner asked plaintiff if she wanted an adjustment, Hart agreed, and then went into defendant's office fully clothed. Plaintiff contended that defendant negligently adjusted her cervical spine, that defendant had been drinking, and touched her inappropriately. She then saw a psychiatrist who diagnosed here with PTSD, and commenced treatment for her cervical injury. In early 1991, she was involved in another car accident. Her injuries were apportioned 75% to the second accident and 25% to the defendant's adjustment. Defendant denied the allegations and challenged plaintiff's credibility. Arbitrator Douglas J. Sameshima found no comparative negligence and awarded plaintiff general and special damages of $9,465 and **punitive damages of $9,400**. [This case is also potentially a Category 2 case, but the claim focused more on the negligence resulting in the physical injury than the other claims.] (Dr.)

5. Offenses Against Mental and Physical Freedom: Intentional/Negligent, Defamation, False Arrest, Malicious Prosecution

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[593] *Ditto V*, 78 P.3d 331.
[594] *Id.* at 338.
[595] *Ditto VI*, 80 P.3d at 976.
[596] *See Ditto V*, 78 P.3d at 334.

Case F1: *Anthony P. Locricchio v. Legal Services Corporation of Hawaii, Rita Geier, Rita Bender, Clinton Bamberger, Charles Jones, and Fabio de la Torres* (Federal Court judgment entered 12/17/85). Plaintiff Locricchio, the Executive Director of Legal Services of Hawaii (a non-profit corporation providing services to low-income residents), alleged that, following a dispute over attorney caseloads, certain LASH employees defamed him through written allegations of misuse of LASH funds, interfered with his contractual relations with LASH, and caused him to be wrongfully terminated, and to suffer emotional distress. After a thirteen-day trial, a federal court jury found for Locriccho, finding three instances of defamation and actual malice. The jury awarded plaintiff $125,000 in general damages and $25,000 in special damages; $87,000 for interference with contract; $200,000 for interference with prospective business advantage; and **$100,000 in punitive damages.** Judge Harold M. Fong upheld the jury's verdict. (B/Nonprofit) & (Is)

Case S14: *James D. Clawson v. Sears, Roebuck & Co., Michael French, Mark Johnson, City and County of Honolulu, Honolulu Police Department* (judgment entered 12/1/87). Plaintiff, a 40-year-old self-employed man, contended that he was assaulted/battered, falsely arrested, and maliciously prosecuted as a result of defendant Sears' claim that he sought a refund on a paint roller that he did not actually purchase, resulting in emotional distress. Despite evidence that plaintiff had engaged in "refund fraud," the jury found after nine days of trial that defendants' detention of plaintiff was not reasonable, awarding damages of $5,500 for false imprisonment, $12,000 for defamation, $1000 for assault, $1,032 for malicious prosecution, and $18,000 for negligent infliction of emotional distress. In a separate verdict, the jury then found Sears' acts were wilful with conscious indifference to the consequences, awarding **$20,000 in punitive damages**. Sears' motion for a new trial was granted by Circuit Court Judge Marie Milks. (B) & (Is) & (City)

Case S20: *John A. McCurdy Jr. v. Stephen L. Schlesinger, Maui Plastic Surgery Corp.* (judgment entered 8/11/88). Plaintiff McCurdy, a 38-year-old single Maui ENT surgeon who was then the only surgeon on Maui performing plastic surgery, claimed that defendant Schlesinger, a plastic surgeon who had arrived on Maui in 1980, defamed him by telling patients and others that plaintiff was not qualified to perform plastic surgery and caused a patient to bring a baseless malpractice action against plaintiff. (A nationwide dispute existed between plastic surgeons and other physicians who performed plastic surgery about the requisite qualifications.) Plaintiff claimed injury to his

reputation and practice, emotional distress, and alleged that he was forced to relocate to Honolulu and lost earnings. After nine days of trial, the jury found defendant had defamed plaintiff, awarding general damages of $25,000 and **punitive damages of $350,000, reduced after defendants' motion for new trial/remittitur was granted by Circuit Court Judge Boyd Mossman to $50,000.** (Dr.) & (Dr./B)

Case S22: *Patrick Lessary v. Esther Lessary; Esther Lessary v. Leonard Appell, dba Appell Affordable Legal Services* (judgment entered 9/7/88). Plaintiff Esther Lessary, whose minor daughter had been raped by her brother Patrick Lessary, claimed that Patrick's criminal attorney third-party defendant Appell, an attorney with a prior felony conviction record that he failed to disclose while seeking admission to the Hawaii bar (*see* Case S21), caused her severe emotional distress during the rape trial, attempted to coerce her into withdrawing charges against the plaintiff, and send a defamatory letter to her employer. (In an appeal of Patrick's criminal conviction, the Hawaii Supreme Court found that Appell had not provided adequate counsel to Patrick.) The only claim remaining for trial was Esther's third-party complaint against Appell. After a stay in Appell's bankruptcy proceeding was lifted, an eight-day trial was held and the jury awarded to Esther $31,000 in general damages, $150,000 in special damages, and **punitive damages of $800,000**. (Is/LP)

Case S29: *Thomas F. Schmidt and Lorinna J. Schmidt v. Association of Apartment Owners of Marco Polo Condominium* (judgment entered 1/02/93). Plaintiffs owned residential units and a commercial unit (Mr. Schmidt's realty office) at the Marco Polo Condominiums. After overhearing a conversation between the security director and the AOAO's president in which they referred to getting rid of Schmidt with a "bang bang" (making a gun gesture) and hiring a big Samoan to kill him, Schmidt filed the action alleging multiple counts, including defamation and negligent/intentional infliction of emotional distress. (This case was one of several actions filed by plaintiff against the AOAO and Board of Directors of the Marco Polo; *PIJH* noted there were over 50 court files in the case and the jury verdict was 63-pages long.) Plaintiffs sought admission of over 200 statements made by defendants, including calling plaintiffs "crooks . . . liars . . . Nazis," and 25 of these statements were submitted to the jury. After a 22-day trial, the jury found for defendants on all substantive counts, except it found that the security director and president has negligently inflicted emotional distress on Schmidt, but the jury awarded no general or specific damages for this claim. Nonetheless, the jury awarded **punitive damages of $35,000 against**

defendants ($5,000 against the security director and $30,000 against the president). Defendants' motion for JNOV on the grounds that punitive damages were not allowable for mere negligence was denied and Circuit Court Judge Virginia Crandall entered judgment for plaintiffs. (B/AOAO)

Case S30: *Reinhard Mohr v. Alexandra Kaan, aka Alexandra Gabrielle* (judgment entered 6/2/93). Plaintiff Mohr, a 50-year-old married attorney, sued defendant Kaan, a female attorney, for defamation arising out of a series of letters that Kaan wrote to Mohr. (Mohr was retained by a client who was dissatisfied with Kaan's representation of him in a criminal proceeding and was seeking an accounting of Kaan's services and fees). In letters that Kaan knew or should have known would be turned over to the client, Kaan wrote that Mohr was "offensive, overzealous, incorrect and unscrupulous in your attempt to generate a fee for yourself or support your own drug habit," described plaintiff as an "idiot," and made her statements about Mohr's drug use on the basis of rumor and hearsay. In the jury-waived proceeding, Circuit Court Judge Kevin S.C. Chang found after a one-day trial that Kaan had published the statements with actual malice and that Mohr had suffered emotional distress, awarding Mohr $1,000 in general damages and **$1,500 in punitive damages**. (I/LP)

Case F6: *Brenda Lynne Carnell v. Cheryl Grimm, and other named police officers, City and County of Honolulu* (Federal Court judgment entered 10/17/96). Plaintiff, a 32-year-old female nurse, contended that she was kidnapped, raped, and then escaped. She alleged that the two Honolulu police officers who then found her tried to force a statement from her, assaulted her during arresting her, falsely arrested her, refused her appropriate medical attention, and violated her civil rights. The police officers contended that plaintiff was upset, uncooperative, intoxicated, and never told them or others she had been raped, and that her credibility was in issue. Trial was narrowed to only the two arresting officers Flynn and Noguchi. After five-day trial, the federal court jury found for plaintiff, concluding that both officers had ignored her serious medical needs, were deliberately indifferent, and acted recklessly and callously toward plaintiff, awarding $32,000 in compensatory damages and **$65,000 in punitive damages against the officers (apportioned equally).** Judge David A. Ezra entered judgment accordingly. (Is/officers, City)

Case F7: *Emil R. Pulse v. City and County of Honolulu, Michael S. Nakamura, Timothy Mariani, and William Lurbe* (Federal Court judgment

entered 1/30/01). Plaintiff, a carpenter apprentice who lived on a 24-foot-long sailboat tied to a pier in Keehi Lagoon Harbor, alleged that two Honolulu police officers violated civil rights laws and maliciously prosecuted him. The defendants had arrested him in the early morning hours after being called to the scene by a complaint about plaintiff being intoxicated and threatening a neighbor with a loaded gun. Pulse, who was incarcerated for three years for the incident, filed this action on the basis that the police had performed a warrantless search and seizure and committed perjury. Trial was limited to the Section 1983 count and pendent state civil rights violations, and the false imprisonment claim against the two officers. After six days of trial, a federal court jury found for plaintiff that the search and seizure had been unlawful and plaintiff had been wrongfully incarcerated. The jury awarded $50,000 **(80% Mariani/20% Lurbe)** in general damages and **$350,000 for punitive damages (same allocation).** Judge Susan Oki Mollway entered judgment accordingly. (Is/officers/City)

6. Dishonesty: Fraud, Conversion, Breach of Contract

Case S7: *Mary Lou Critcher v. Jeffrey Mitchell Critcher aka Jeff M. Critcher, Pacific Coast Savings and Loan Association* (judgment entered 2/5/86). In this lawsuit, a mother sued her son for breach of contract, fraud, emotional distress, breach of confidential trust, constructive trust, and wanton and reckless acts resulting from the sale of real property. Defendant filed a counterclaim and separate lawsuit against his mother and her initial law firm, alleging malicious prosecution, libel/slander, and abuse of process. (The second lawsuit was dismissed as frivolous, and attorneys fees were granted under HAW. REV. STAT § 607-14.5. Pacific Coast was voluntarily dismissed from the first lawsuit.) After eight days of trial, the jury found for the mother, awarding her $85,000 in compensatory damages, $10,000 for emotional distress, and **punitive damages of $10,000.** (I/LP) & (B)

Case S21: *Robert L. Rodman v. Leonard Appell and State of Hawaii* (judgment entered 9/2/88). Plaintiff Rodman brought this action for legal malpractice, breach of contract, conversion, and emotional distress against defendant Appell, an attorney, whom Rodman had retained in a separate legal malpractice action, because Appell had removed all or a significant portion of Rodman's $10,000 retainer from the attorney trust account without his permission. Appell had been denied a license to practice law in New Hampshire for lack of moral integrity. (Plaintiff's claim against the State of Hawaii, for negligently licensing Appell, was denied by Circuit Court Judge

Ronald Moon on summary judgment, a ruling which was upheld by the Hawaii Supreme Court.) Defendant's counterclaims were dismissed, he failed to answer an amended complaint, resulting in a default judgment, and he filed for Chapter 7 bankruptcy. After the bankruptcy stay was lifted, the case proceeded to seven days' trial on damages (defendant did not attend trial after day 4). The jury awarded plaintiff no general damages, special damages of $12,943, and **punitive damages of $250,000**. (I/LP) & (State)

7. Unsafe Products

Case S16: *Stephen Masaki, Frank Masaki, and Sumiye Masaki v. General Motors Corp., Servco Pacific, Inc.* (judgment entered 3/15/88). Plaintiff Stephen Masaki, a 28-year-old single part-time mechanic, was rendered a quadriplegic as a result of being run over by an allegedly defective transmission in a 1976 Chevy Van he was attempting to restart as part of his mechanic duties. His parents Frank and Sumiye Masaki claimed negligent infliction of emotional distress and loss of consortium related to seeing Stephen in the hospital after his accident. Stephen lost all memory of the accident, but his co-worker who was sitting in a vehicle adjacent to the van as Stephen was working on it testified that Stephen attached a remote starter cable and was attempting to remove the cable when the van's transmission shifted into reverse, running over Stephen. Plaintiffs alleged numerous defects in the van transmission system, that GM was aware of hundreds of deaths and injuries arising from the defect for over ten years, and that GM had failed to warn or remedy the problem. After 49 days of trial, the jury found defendants 60% at fault and plaintiff Stephen 40% at fault, awarding (as reduced by comparative negligence): 1) for Stephen, $1.8 million on general damages, $2.26 million in special damages, and **(unreduced)* punitive damages against GM of $11.25 million**; 2) for Frank, $336,000 for loss of consortium, and $276,000 for emotional distress; and 3) for Sumiye, $336,000 for loss of consortium, and $276,000 for emotional distress. (*Circuit Court Judge Leland Spencer ruled that punitive damages could not be reduced by plaintiff's contributory negligence.) Defendant appealed and, in 1989, the Hawaii Supreme Court affirmed that punitive damages could be awarded in products liability cases, but reversed the punitive damages award because the Court adopted a new "clear and convincing" standard for punitive damages awards.[597] On remand, the case settled for a confidential amount. (Bs)

[597] *See Masaki*, 780 P.2d at 566.

Case S31: *Sosimo B. Tabieros and Mitsuko H. Wilson v. Matson Navigation Co., Inc. and Clark Equipment Co.* (judgment entered 7/9/93). Plaintiff Tabieros, a single 50-year-old maintenance worker at Matson Terminals, was sitting in a tow vehicle next to a crane at the container yard at Sand Island when Howard Diaz, an employee on loan to Matson, operating a straddler manufactured by defendant Clark in 1963, caused the straddle to collide with plaintiff's vehicle, crushing both of Tabieros' legs and causing other severe injuries, eventual scarring and deformity, and 12% permanent disability.

The first trial in this case was held in 1990. The circuit court entered summary judgment in favor of Diaz and Matson and dismissed the plaintiff and his common-law wife's claims against MH&R. In June 1990, a jury returned a verdict in favor of Clark, the only remaining defendant.

On appeal, the Hawaii Supreme Court vacated the jury verdict and remanded for new trial, finding, *inter alia*, that the court erred in granting summary judgment to defendant Clark on the punitive damages claim. The plaintiffs appealed, and, in a memorandum opinion, the Supreme Court: (1) vacated the judgments that had been entered in favor of Matson Navigation and Clark; and (2) affirmed the favorable judgments as to Diaz and MH & R.[598]

In March 1993, a second jury trial (reported in *PIJH*) commenced between the plaintiffs and the defendants Clark and Matson Navigation. During the trial, the circuit court granted directed verdicts in favor of Clark on the plaintiffs' claims of breach of implied warranties of merchantability and/or fitness for a particular purpose, negligent manufacture, and negligent failure to retrofit. Circuit Court Judge Wendell Huddy dismissed the emotional distress claim of Mitsuko Wilson, Tabieros' common-law wife. After 23 days of trial, the jury found that the straddler had a dangerous defect present at the time of sale, and found Clark 34% at fault, Matson 55% at fault, and plaintiff Tabieros 15% at fault. The jury awarded plaintiff $279,000 in general damages, $200,400 in special damages, and **punitive damages of $52,000 (against Clark only)**. (Bs)

After the verdict was returned, but before entry of judgment, the plaintiffs settled with Matson Navigation by way of a joint tortfeasor release agreement pursuant to the Uniform Contribution Among Tortfeasors Act , HAW. REV. STAT., §§ 663-11 through 663-17 (1993). Thereafter, the plaintiffs filed a dismissal of all of their claims against Matson Navigation. Judgment against Clark was entered on July 9, 1993 for its pro rata share of the jury's award.

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[598] Tabieros v. Diaz, 827 P.2d 1148 (Haw. 1992) (mem.) (*Tabieros I*).

The circuit court denied Clark's motion for a reduction of the judgment in the amount paid by Matson Navigation to the plaintiffs pursuant to the joint tortfeasor release agreement. Clark again appealed to the Hawaii Supreme Court.

In a lengthy opinion, the Supreme Court, Levinson, J., held that: (1) a manufacturer does not have duty to retrofit its products with post-manufacture safety devices unavailable at time of sale; (2) the manufacturer had not assumed a duty to retrofit the carrier; (3) the worker's girlfriend did not suffer severe emotional distress; (4) the danger created by the "blind zone" in the carrier's cab was open and obvious, so that no duty to warn of danger existed; (5) the carrier was not defective under the consumer expectations or latent danger tests; (6) any failure to warn of danger was not a legal cause of accident; (7) the evidence supported instruction on specific claims of plaintiff's failure to mitigate; (8) the instructional errors required reversal; and (9) the manufacturer was entitled to credit for sums paid by owner in excess of its share of verdict. Affirmed in part, vacated in part, and remanded.[599]

8. Turning the Tables: When Defendants Win Reverse Punitive Damages

Case S24: *Sherry Vidmar v. Paul Kan* (judgment 6/18/90). *Vidmar* involved a violent domestic dispute between plaintiff, a single female sales clerk, and defendant, an engineer. Plaintiff claimed that defendant sexually abused her and committed assault and battery for a 1-1/2 year period, resulting in physical and psychological injuries. Defendant denied the allegations and counterclaimed also seeking damages for assault and battery, deceit, and abuse of process. After seven days of trial, the jury found partially in favor of both parties: that defendant struck plaintiff without her consent, that plaintiff struck defendant without consent, that plaintiff's suit was not an abuse of process, and that plaintiff held defendant's property without consent. The jury awarded general damages to plaintiff of $1000, no special damages, and **punitive damages of $7,500.** The jury also awarded special damages of $300 to defendant and **punitive damages of $750.**
(I) [This Case also reported in Category 1]

Case F3: *Michelle M. Gretzinger v. University of Hawaii Professional Assembly, University of Hawaii, and Ramdas Lamb* (Federal Judgment entered 9/17/96). Plaintiff, a University of Hawaii student, claimed that for three years she was subjected to unwelcome sexual advances, including

[599] Tabieros v. Clark Equipment Co., 944 P.2d 1279 (Haw. 1997) (*Tabieros II*).

sixteen rapes, by her professor Ramdas Lamb, who used his position as an undergraduate advisor to bribe students into sexual relationships. Plaintiff alleged violations of Title IX, Section 1983, and intentional infliction of emotional distress. Lamb counterclaimed for sexual harassment and retaliation, alleging that the allegations were lies. Before trial, the University settled with plaintiff; the union was dismissed by motion; and the federal claims against Lamb were dismissed. After fourteen days of trial, the federal court jury found that Lamb did not intentionally inflict emotional distress on plaintiff. The jury found in favor of Lamb on his claims of defamation, false light, abuse of process, intentional infliction of emotional distress, and wanton and willful misconduct, awarding him $40,000 in general damages, $12,750 in special damages, and **$80,000 in punitive damages.** The jury verdict was upheld on appeal.[600] (Union) & (I)

Case S36: *Ronald T. Kikumoto v. HTH Corporation et al.* (judgment entered 4/1/98). In this whistleblower case, plaintiff Kikumoto, a 43-year-old former Vice-President/Director of defendant HTH Corporation, claimed he was wrongfully terminated in retaliation for opposing the defendant's directives on race and color discrimination, defendant's pattern of building code violations, and defendant's worker safety violations. In a letter complaining about the violations, plaintiff emphasized that he was substantially undercompensated. Defendants counterclaimed, contending that plaintiff obtained confidential records and information in order to extract a salary increase, a breach of his fiduciary duty, which justified termination. After a nine-day trial, the jury found that defendants did not violate the whistleblower or employment law, and that his termination did not violate public policy. The jury found that plaintiff breached his fiduciary duty and awarded defendants $3.00 for the breach and **$1.00 in punitive damages.** (B)

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[600] Gretzinger v. University of Hawaii Professional Assembly and Ramdas Lamb, 156 F.3d 1236 (9th Cir. 1998) (unpublished opinion) (affirming jury verdict in favor of Lamb and court's denial of plaintiff's motion for a new trial).